ON THE LAW

— OF —

ABSCONDING DEBTORS.

A PRACTICAL TREATISE

ON

THE LAW OF

ABSCONDING DEBTORS,

AS ADMINISTERED IN THE

PROVINCE OF ONTARIO,

WITH A LARGE NUMBER OF FORMS OF PROCEEDINGS THAT WILL BE FOUND USEFUL AND CONVENIENT IN THE PRACTICAL APPLICATION OF THE ABSCONDING DEBTORS' ACT.

BY

JAMES SHAW SINCLAIR, Q.C.,

JUDGE OF THE COUNTY COURT AND LOCAL JUDGE OF THE HIGH COURT OF JUSTICE AT HAMILTON.

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Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and eighty-three, by JAMES SHAW SINCLAIR, Q.C., Judge of the County Court and Local Judge of the High Court of Justice at Hamilton.

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To The

HONOURABLE T. B. PARDEE, Q.C.,

Commissioner of Crown Lands for the Province of Ontario,

THIS WORK

— IS —

WITH HIS PERMISSION

Respectfully inscribed

— BY THE —

AUTHOR.

PREFACE.

THE necessity for some work on the Law of Absconding Debtors is my apology for publishing at the present time this small addition to the legal literature of our Province. The repeal of the Insolvent Acts in 1880 brought into active operation the Absconding Debtors' Act, which had for about sixteen years before that time become practically obsolete. It is now the only statute we have, under which an equal distribution of a debtor's property may in certain cases be obtained, and the frequent resort to its provisions has induced me to point out in the following pages the law and practice under that statute. The writer has tried to make this work as useful as possible to all connected with the administration of justice under the Absconding Debtors' Act, and to produce a book of ready and easy reference in all questions arising under that statute. To the legal practitioner in whose practice a frequent reference to the law of Absconding Debtors is necessary, I have striven to make the work one of special interest and importance. To one in whose practice reference may seldom be made to such law, I have, as plainly as I possibly could, brought before him the practical operation of the Act. To the officers of the law in the execution of process against Absconding Debtors, (and so far as possible point out to them their duty,) this work will, I trust, be found specially useful and instructive. To all whose rights or duties are regulated by the provisions of the Absconding Debtors' Act, the present work, it is hoped, will be of service. The Appendix of Forms will be found specially useful to all in the practical application of the Act. Not only has it been the object of the writer to make this book serviceable in all cases arising under the Absconding Debtors' Act, but special attention has also been paid to such ques-

tions as that of Bail, so that in cases of arrest on civil process resort may be had to this work for assistance. I have endeavoured to collect and bring before the reader every reported case in our own Courts bearing on the subject on which I have assumed to write. I have also advisedly sought for information and instruction, and not in vain, among the many decisions on this subject in the American Courts. With legislation in all or nearly all of the States of the American Union much akin to ours on the subject of Absconding Debtors, I do not consider it necessary to apologise for drawing largely from the decisions of their Courts. The eminence of the American Courts and Judges whose decisions have been cited is the best answer to any objection to the citation of such authority. When we consider the general disinclination, if not repugnance, of the majority of our legislators to re-enact another Insolvent Act, and the improbability of such being done for many years to come, it forms some excuse for the appearance at the present time of such a work as this. The writer has striven hard to fill a void which, he believed, did exist; and if he has succeeded in a small measure in accomplishing that object, his best hopes will be realized.

No one can write a work without falling into many inaccuracies; for all such I crave the indulgent consideration of the reader. My desire has been accuracy in every respect, whether or not I have succeeded in reasonably accomplishing that in part must be left for the considerate reader to judge.

I have to acknowledge the able assistance I have received from JAMES BICKNELL, Jr., Law-Student, Hamilton, in making out the Index of Cases, and what, without which any book no matter how good is incomplete, will, I trust, be found—a full index of subjects.

J. S. SINCLAIR.

HAMILTON, *October, 1883.*

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REVISED STATUTES OF ONTARIO.

CHAPTER 68.

CORRIGENDA.

Page 70, line 3, after "11 Maine, 241," add "but *quære* as to sureties' liability in Ontario." See form of covenant, Schedule B to R. S. O. c. 16, page 224, Vol. I, R. S. O.

" 86, line 5, for "45 Victoria," read "46 Victoria."

" 100, line 1, do. do.

" 101, line 1, do. do.

" 109, line 20, do. do.

" 116, line 8 from bottom, for "Sheriff," read "Bailiff."

[illegible] intent to defraud his creditors (*g*), and at the time of his so departing is possessed to his own use and benefit, of any real or personal property (*h*), credits or effects therein, not exempt by law from seizure (*i*), he shall be deemed an absconding debtor (*j*) and his property, credits or effects aforesaid, may be seized and taken (*k*) for the satisfying of his debts by a writ of attachment. C. S. U. C. c. 25, s. 1.

Wallis v. Birks, 13
Walmésley v. Dibdin, 23
Warmoll v. Young, 36
Warren v. De Burgh, 61
Waters v. Monarch F. and L. Insurance Co., 73
Watson v. Henderson, 106
" v. Mid-Wales Ry. Co., 103
" v. Severn, 34
" v. Todd, 119
Watt v. Burnett, 48
Weeks v. Wray, 37
West v. Meserve, 75
" v. Williams, 62
" v. Thomas, 38
Williamt v. Merrier, 4, 45, 106
" v. Piggott, 46
" v. Powell, 71
Williams, *ex p.*, *re*, Jones, 38
Wilson v. Dundas, 9
" v. Gabriel, 103
" v. Guttery, 46
" v. Lane, 70, 71
" and Quarter Sessions, Huron and Bruce, 16, 35
" v. Wilson, 101, 106
Wilham v. Gompertz, 23
Wood v. Dunn, 110
Woodbury v. Long, 69
Woods v. Rankin, 119
Woolan v. Wright, 77

REVISED STATUTES OF ONTARIO.

CHAPTER 68.

An Act Respecting Absconding Debtors (*a*).

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

AN ABSCONDING DEBTOR DEFINED.

Who to be regarded as an absconding debtor.

1. If any person (*b*) resident (*c*) in Ontario indebted (*d*) to any other person (*e*) departs from Ontario (*f*) with intent to defraud his creditors (*g*), and at the time of his so departing is possessed to his own use and benefit, of any real or personal property (*h*), credits or effects therein, not exempt by law from seizure (*i*), he shall be deemed an absconding debtor (*j*) and his property, credits or effects aforesaid, may be seized and taken (*k*) for the satisfying of his debts by a writ of attachment. C. S. U. C. c. 25, s. 1.

(*a*) The proceeding by attachment against the property of an absconding debtor as a means of obtaining payment by a creditor of his debt, was introduced at a comparatively early date in the legislation of this Province. More than half a century ago an Act was passed on the subject, reciting that it was "necessary for the protection of persons engaged in trade to afford the means of attaching the property of absconding debtors, that the same may be taken in execution and sold for the benefit of their creditors" (2 Wm. IV, chap. v). It was considered that the rights conferred by that statute on attaching creditors were too extensive and inconsistent with the just rights of creditors, who had not adopted attachment proceedings but had obtained judgment and execution in the ordinary way, and three years afterwards that Act was amended by the Statute 5, Wm. IV., chap. v. The right of attachment was extended to small claims by the 12 Vict., chap. 69, which was repealed and its provisions extended to Division Courts under the general Act establishing these courts, known as 13 and 14 Vict., chap. 53. The two statutes first mentioned contained the law relating to attachments against absconding debtors in the Superior and District and afterwards County Courts, until the passing of the Common Law Procedure Act in 1856, when they were expressly repealed by the 318th section of that Act, and provision made in respect to proceedings against absconding debtors. The 43rd to the 58th sections of that Act inclusive, and shortly afterwards consolidated in the Consolidated Statutes of Upper Canada, chap. 25, form the basis of our present Statute. Since the repeal of the Insolvent Act, attachment proceedings have become frequent and necessary It is the only method in this Province at the present time by which the estate of an absconding debtor can be reached in a summary way and protected for the payment of his debts. The circumstances under which such proceedings can be taken, the means employed, the facts necessary to be

shewn, and the duties of those authorized to execute the process and render the property liable to the just claims of attaching creditors are, in the opinion of the writer, of sufficient importance to demand legal discussion and elucidation. The present is almost too practical an age for us to inquire deeply into the origin of the proceeding by attachment. Its origin, however, is said to be of great antiquity in the common law of England, but that part of it which forms so important a part of the legal jurisprudence of the different American States and this Province, finds its origin in the custom of Foreign Attachment of the City of London. Mr. Drake, in his work on Attachment, at section 4, says: "Nothing more distinctly characterizes the whole system of remedy by attachment than that it is a special remedy at law, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and that where, from a conflict of jurisdiction, or from other cause, the remedy by attachment is not full and complete, a Court of Equity has no power to pass any order to aid or perfect it." From the many features of similarity between our Act and the Statutes of most of the States of the American Union, it would appear that our earliest legislation on that subject must have been largely drawn from the experience of our neighbours. With so much in common in the legislation of that great country on this subject, with the legislation of our own Province, we may fitly bring from their legal sources very many authorities in their courts for our benefit and instruction, affording, as they do, much light upon a branch of the law upon which the decisions of our own courts are quite limited.

(b) WHAT PARTIES SUBJECT TO THE ACT.

In several of the American courts it appears to have been a vexed question for a long time, whether foreign corporations were subject to the remedy by attachment—Drake on

Attachment, section 79. From the language of our statute it appears to be quite plain, that neither a domestic nor foreign corporation could be considered an absconding debtor within its plain provisions. The statute can have application to individuals only and not to corporations. An attempt to apply the first and second sections of the Act to defendant corporations will prove the correctness of the view advanced. There is no reason, however, for denying to corporations that may be creditors, the right to take proceedings by attachment. The expression "any other person" in the early part of the first section can by the aid of the Interpretation Act be very properly held to include corporations; see R. S. O. chap. 1, sec. 7, sub-secs. 18 and 23; see also *Trenton Banking Co.* v. *Haverstick*, 6 Halsted, 171.

An attachment could not properly be issued against heirs, executors, trustees or others claiming merely by right of representation; *Jackson* v. *Walsworth*, 1 Johnson's Cases, 372; *Metcalf* v. *Clark*, 41 Barbour, 45. But if any person in any of these representative capacities should render himself *personally* liable, proceedings by attachment could be taken: *Matter of Galloway*, 21, Wendell 32. A married woman could if liable to judgment be subject to attachment; see *Re Widmeyer* v. *McMahon* 32, C. P. 187; *Berry* v. *Zeiss*, 32 C. P. 231 and cases cited; *Williams* v. *Mercier*, 9 Q. B. D. 337; *In re Gearing*, 4 App. R. 173. So also could a married woman be a plaintiff in attachment proceedings: Rev. Stat., Chap. 125, sec. 20; *Ingram* v. *Taylor* 46, U. C. R. 52; *Hooper* v. *Maitland* 7, P. R. 50; *Shelley* v. *Goring* 8, P. R. 36; *Carroll* v. *Fitzgerald* 6, App. R. 93; *Brown* v. *North*, 9 Q. B. D. 52.

(*c*) MUST BE A RESIDENT OF ONTARIO.

It is almost a contradiction to say, that one who has absconded from the Province, can properly be termed "a

resident of Ontario;" but the meaning of the expression evidently is, that if the defendant lived in the Province up to and until his departure from it, he is "a resident" within the meaning of the Act. In Drake on Attachment, sec. 59, it is said, "a *resident* and an *inhabitant*" mean the same thing. A person resident is defined to be, "one dwelling or having his abode in any place." It was held under the Act of 2, Wm. IV. chap. 5, that the property of a person who usually resided in the United States, but who employed persons in the Province, and who came frequently to superintend their work, might be attached: *Ford* v. *Lusher*, 8 O. S., 428. In *Taylor* v. *Nicholl*, 1 U.C.R, 416; it was held that where a person usually residing in Scotland came to Canada to settle some affairs, and while here referred some disputes which had arisen concerning them to arbitration, and an award was made against him which was not payable until nearly two years after he had left the Province and returned to Scotland, and he had contracted no debts while here, that he did not come within the Absconding Debtors' Act, 2 Wm. IV., chap. 5. In *Higgins* v. *Brady*, 10 U. C. L. J., 268, it was held under the Consolidated Statutes of Upper Canada, chap. 25, and from which this Act was chiefly copied, that a debtor whose family resided in the United States, but who for several months was in this Province purchasing horses for the United States' army, and contracting debts here for horses so purchased, with the declared intention that he would move permanently into Canada, was a sufficient resident of Upper Canada to be within the operation of the Absconding Debtors' Act.

The present Chief-Justice of the Common Pleas Division, then Mr. Justice Wilson, said, (after repeating the facts just quoted): "I cannot say that this is not such a residence here as will make him answerable to the like process to which our people are subject, on the contrary I think it is, although it is by no means a change of domicile."

It is submitted that it would be a fraud on our law to allow one of two foreigners to issue an attachment against the other who happened to be here on some temporary business, intending to return to his own country for a debt contracted there; see *Frear* v. *Ferguson*, 2 Cham. R. 144; *Romberg* v. *Steenbock*, 1 P. R., 200; *Brett* v. *Smith*, 1 P. R., 309. And it is further submitted that a resident of this country could not legally issue an attachment against a citizen of another country who had come here for a temporary purpose: *McPhadden* v. *Bacon*, 9 L. J. N. S., 226; *Clements* v. *Kirby*, 7 P. R., 103; *Robertson* v. *Coulton*, 9 P. R., 18; *Ex parte Gutierrez. In re Gutierrez*, 11 Ch. D. 298; *Butler* v. *Rosenfeldt*, 8 P. R. 175; *Smith* v. *Smith*, 19 L. J. N. S., 158.

It would appear that the word "resident" here used must receive a more liberal interpretation than when employed in some other Acts of Parliament; see Sinclair's D. C., Act 86, *et seq.*, and the Act of 1880, at pages 22 and 34: *Ford* v. *Drew*, 5 C. P. D., 59. In *Ex parte Breull. In re Bowie*, W. N., 1880, at page 198 on appeal from the Court of Bankruptcy, it was held that where a debtor's summons was issued out of the London Bankruptcy Court against a person who was in the employment of a Bank in the City of London, but who lived with his mother in one of the suburbs outside the district of the London Court, for a debt contracted in the city, proceedings were properly taken against him in the city Court.

James, L. J., was of opinion that the debtor's residence was within the district of the London Court, on the ground that a man might fairly be said to reside where he was to be found daily. In *Higgins* v. *Brady*, 10 U. C. L. J., at page 269., Wilson, J., says: "The Act of 1832 required that the creditor should have been an inhabitant of the Province. The Act of 1835 altered this and enabled any creditor, whether an inhabitant of the Province or not, to

issue such process. So the Act of 1832 was general in its language against all debtors, although its construction was limited to resident debtors only." In addition to the authorities here cited as to what constitutes a "residence;" see Sinclair's D. C., Act 86, *et seq*; Drake on Attachment, secs. 59 to 68, inclusive; Sinclair's D. C. Act, 1880, pages 22 and 34; *Martin* v. *W. Derby Union*, W. N., 1883, page 52.

(*d*) MUST BE INDEBTED.

Does this word "indebted" mean that the debtor must be liable for a money demand, such as on a bond, bill of exchange, or other security for money, or for goods sold and delivered, money lent, or a like claim, or has it a more extensive meaning, comprising cases where the claim, though arising out of contract, presents damages of an unliquidated nature? In the second Chapter of Drake on Attachment, secs. 9 to 37, inclusive, will be found an instructive history of the progress of legal decision in the American Courts on this subject. In the earlier times a limited meaning was given to the different statutes, in regard to the causes of action for which proceedings by attachment could be taken. Damages of an unliquidated nature were held not to be within the scope or object of such proceedings; but there has been a gradual outgrowth of that opinion, and a decided tendency to enlarge the subject of attachment proceedings. The word "debt," "indebted," and kindred words have been held to include claims for unliquidated damages arising from contract, such as a breach of covenant, as well as moneys due on specialties or simple contracts.

Our record of judicial decision, limited as it is, has not been in the same direction. The general opinion of our Courts and the profession, is that our statute cannot properly receive that wide construction, which similar legislation has received in the American Courts. Whether its

provisions could not be extended with advantage is a matter for legislative consideration.

In *Clock* v. *Alfield*, 5 O. S. 504, it was held under the statute of William, that the Court would only grant an attachment for sums certain, and where such an affidavit could be made as would enable a plaintiff without a judge's order to sue out bailable process.

In *Clark* v. *Ashfield*, E. T. 7, Wm. IV., it was held that an attachment could not be granted for unliquidated damages. The word "indebted" is used in the Statute 2, Wm. IV., chap. 5, as in our present Act. Debt for a penalty could not well be said to be within the spirit and intention of the Act. It is submitted generally that all claims, which would be the subject of special endorsement, on a writ of summons, under Rule 14 of the Ontario Judicature Act, or of a special summons, under the 79th sec. of the Division Courts' Act, or which would be the subject of garnishment under any of our statutes, would be the subject of proceedings under this Act. The following decisions illustrate the views of our courts on the subject of special endorsement: *Jones* v. *Greer*, 3 U. C. L. J. 91; *Standing* v. *Torrance*, 4 U. C. L. J. 235; *Mearns* v. *G. T. R. Co.*, 6 U. C. L. J. 62; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Buell* v. *Whitney*, 11. C. P. 240; *Bank of Montreal* v. *Harrison*, 4 P. R. 331; *Sinclair* v. *Chisholm*, 5 P. R. 270; *Smart* v. *N. & D. Rivers R. Co.*, 12 C. P. 404; *McDonald* v. *Burton*, 2 L. J., N. S. 190; *Northern R. Co.* v. *Lister*, 4 P. R. 120; *Worthington* v. *Boulton*, 6 P. R. 68; *Wallbridge* v. *Brown*, 18 U. C. R. 158; *Hope* v. *Ferris*, 30 C. P. 520; see also *Smith* v. *Wilson*, 4 C. P. D. 392, S. C. 5, C. P. D. 25.

As to what debts are the subject of garnishment, see Sinclair's D. C. Act 99, 147, and Sinclair's D. C. Act, 1880, p. 2, and cases therein cited, and *Howell* v. *Met. District Railway Co.*, 19 Ch. D. 508; *Chatterton* v. *Watney*, 17 Ch.

D. 259; *Roberts* v. *Death*, 18 L. J. N. S. 101; *Walker* v. *Rooke*, 6 Q. B. D. 631; *Gordon* v. *Jennings*, 9 Q. B. D. 45; *In re Holland* v. *Wallace*, 8 P. R. 186; *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437; *In re Sato* v. *Hubbard*, 8 P. R. 445. As the law stands now attachment proceedings are not confined to *legal* debts only, but equitable claims would equally be within the scope of the Act: *Wilson* v. *Dundas*, W. N., 1875, 232; *In re Cowans' Estate*, *Rapier* v. *Wright*, 14 Ch. D. 638; *Hall* v. *Lannin*, 30 C. P. 204; *Hope* v. *Ferris*, 30 C. P. 520; *Leaming* v. *Woon*, 7 App. R. 42; *Chatterton* v. *Watney*, 16 Ch. D. 378.

The money must be *overdue* at the time the affidavit is made, otherwise the debtor could not be said to be "indebted" within the meaning of the Act: *Willett* v. *Brown*, 8. P. R. 468; *In re Stockton Malleable Iron Co.*, 2 Ch. D. 101; Drake on Attachment, secs. 13 to 32, inclusive. The case of *In re Moore* v. *Luce*, 18 C. P. 446, was decided upon the language of the Insolvent Act. Whether or not an attachment can be issued on a bill of exchange or promissory note on the last day of grace appears yet to be a matter of uncertainty: *Sinclair* v. *Robson*, 16 U. C. R. 211; *Edgar* v. *McGee*, 1 Ont. R. 287; *Reed* v. *Smith*, 19 L. J. N. S. 12; *Whitwell* v. *Brigham*, 19 Pick. 117. Holding collateral security does not impair the right of attachment: *Cornwall* v. *Gould*, 4 Pick. 444; *Beckwith* v. *Sibley*, 11 Pick. 482; *Whitwell* v. *Brigham*, 19 Pick. 117; *Taylor* v. *Cheever*, 6 Gray, 146; *Libby* v. *Cushman*, 29 Maine, 429. A writ of attachment can issue at suit of the Crown, on forfeiture of a recognisance to appear, and the affidavit therefor can be made by the County Crown Attorney: *Regina* v. *Stewart*, 8 P. R. 297. Where several persons are liable for the same debt, the creditor may proceed by attachment against any one or more of them, in relation to whom any ground of attachment exists, without so proceeding against the others: *Chittenden* v. *Hobbs*, 9 Iowa, 417; *Austin* v. *Burgett*, 10 Iowa, 302.

(*e*) THE CREDITOR.

See note (*b*) to this section. The "other person" here mentioned is referred to in the subsequent clauses of the Act as "the plaintiff."

(*f*) DEPARTS FROM ONTARIO.

The debtor must *actually* have left the Province before an attachment can issue. Should he be secreting himself in the Province to avoid arrest or service of process, or for any other purpose, yet he would not be subject to attachment against him as an absconding debtor. He must have actually *quit* the Province before this proceeding could be invoked. It is not necessary that the debtor should go to a foreign country to render his property subject to attachment. Going to another Province would equally be within the Act.

(*g*) WITH INTENT TO DEFRAUD HIS CREDITORS.

The *intent* with which the defendant departs from the Province is an important element of the case which the creditor has to make out. Merely *departing* is not sufficient; but it must be made with some one or more of the intents mentioned in this section, and the *onus* is on the plaintiff of establishing it: *Shaw* v. *McKenzie*, 6 Sup. R., 181. The intent may be gathered from a variety of circumstances, which, if taken singly would establish nothing, but when taken together establish one of the intents referred to in the Statute. There is no difference in this respect between civil and criminal cases. The author of that invaluable work, Drake on Attachment, says at section 89: "It has never been considered, so far as I have discovered, that mere temporary absence from one's place of residence, accompanied with an intention to return, is a sufficient cause for attachment. Were it so regarded no limit could be set to the oppressive use of this process. Hence we find that usually the absence must either be so protracted as to amount

to a prevention of legal remedy for the collection of debts, or be attended by circumstances indicative of a fraudulent purpose." The same author goes on to say, referring to American cases: "No case is to be found justifying an attachment upon a casual and temporary absence of a debtor;" see *Fuller* v. *Bryan*, 20 Penn. 144; *Mandel* v. *Peet*, 18 Ark. 236; *Ex parte Spiers*, W. N., 1883, page 70. For an examination of the American cases on this subject the reader is referred to the citation of them in Drake on Attachment, from sections 39 to 67, both inclusive. In *R.* v. *Stewart*, 8 P. R. 297, Osler, J., gave expression to these words at page 300: "A debtor who departs from Canada to avoid arrest on criminal process thereby voluntarily withdraws his person from the reach of civil process also, and may well be said to depart with intent to defraud his creditors though that be not his primary or even conscious intention. He comes also within the words of the statute as having departed with intent to avoid *being arrested*." It is sufficient for the creditor to shew that the debtor intends to defraud him without shewing an intention to defraud creditors generally, but himself only: *Wakefield* v. *Bruce*, 5 P. R. 77. Where a man in embarrassed circumstances left the country without first making provision for the payment of pressing claims, it would be evidence of intent to defraud: per Lord Eldon, in *Ex parte Osborne*, 2 V. & B. 177. If a debtor after leaving the Province, in the first instance, for a proper object, protract his residence abroad or elsewhere for an unreasonable time, assigning no cause for his absence and leaving no funds, nor making any arrangements for the payment of his debts, it is submitted that such a case would be within the Act; see *Cumming* v. *Bailey*, 6 Bing. 370. *Ex parte Cohn*, 3 L. T., N. S. 90. The law can best judge of intention by a defendant's acts and if a debtor should leave the Province, and if the effect of his departure and absence was to delay or impede creditors in the recovery of their claims, it is

submitted that the intent to defraud would be complete; see *Ex parte Kilner*, 3 Mont. & A. 722; *Ex parte Bourne*, 16 Ves. 145; *Ex parte Birch*, 2 M. D. & D. 659; *R.* v. *Gordon*, Dears. C. C. 586.

The question of intent can be tried by affidavit before a judge in Chambers, on an application to set aside the attachment: *Jackson* v. *Randall*, 6 P. R. 165. In that case Wilson, J., says at page 169 of the report: "The writ is not to issue because the defendant has departed the Province, as in *Lamond* v. *Eiffe*, 3 Q. B. 910, but because he has departed with intent to defraud."

To set aside an attachment on the ground that the intent was wanting would require a strong case to be made out: *Brown* v. *Riddell*, 13 C. P. 457; *Jones* v. *Gress*, 25 U. C. R. 594; *Delisle* v. *DeGrand*, 3 P. R. 105; *Kidd* v. *O'Connor*, 43 U. C. R. 193; *Butler* v. *Rosenfeldt*, 8 P. R. 175, and especially at page 178, per Osler, J.; *Willett* v. *Brown*, 8 P. R. 468; *Scott* v. *Mitchell*, 8 P. R. 518; *Stammers* v. *Hughes*, 18 C.B. 527; *Stein* v. *Valkinhuysen*, E.B. & E. 65; *Hart* v. *Ruttan*, 23 C. P. 613; Drake on Attachment, section 397 and following sections. The application to set aside attachment must precede special bail or defence to the merits, and must be made promptly: Drake on Attachment, sec. 421; *Regina* v. *Stewart*, 8 P. R. 297. Any defect in the materials on which an attachment is granted may be supplied by affidavits used by the defendant on an application to set aside the writ: *Regina* v. *Stewart*, 8 P. R. 297. The amount for which special bail is to be put in need not be mentioned in the order for the writ.—*Ib.* In a debt due the Crown an affidavit made by the County Crown Attorney was held sufficient.—*Ib.*

(h) DEBTOR MUST LEAVE PROPERTY.

One of the pre-requisites of attachment proceedings is that the debtor must have to his own use and benefit real

or personal property, credits or effects in the Province of Ontario, at the time of his departing. Should he have legally parted with *all* his property before he left, an attachment could not be issued, nor could it be issued if the property was only held in trust: *Jones' Vote*, 1 Hodgins' Election Cases, 163; *McLean* v. *Fisher*, 14, U. C. R. 617. But an equitable estate or interest in land for his own use and benefit would be "real property" and subject the debtor to an attachment; see *Adamson* v. *Adamson*, 7 App. R. 592; *Trenfield* v. *Lowe* L. R. 4 C. P. 454; *Wallis* v. *Birks*, L. R. 5, C. P. 222; *Simey* v. *Marshall*, L. R. 8, C. P. 269; *Blair's Vote*, 1 Hodgins' Election Cases, 21; S. C. 7, L. J., N. S. 219. It may be stated generally that where a debtor has such an equitable interest in real property, as would entitle him to specific performance of a contract in equity, such interest would be "real property" within the meaning of this section. See Story's Equity Jurisprudence, chap. 18, R. & J's Digest, 3602-3652, 4711. The cases in the American Courts are quite numerous on the question of what interest of a debtor in real estate is subject to attachment proceedings. Mr. Drake says at sec, 232: "It may be stated, however, that the general principle which confines the right of attachment of tangible property to such interests therein or descriptions thereof, as can be sold or otherwise made available under execution to satisfy the plaintiff's demand, applies as well to real as personal property." But under the statute we are considering, there are interests in land which would be subject to attachment which could not be sold under execution against lands; see R. & J's. Digest 1428, *et seq.*, and the cases cited.

At section 234, Mr Drake also says: "Another established principle affects with peculiar fitness attachments of real estate, that the attachment can operate only upon the right of the defendant existing *when it is made.* If, prior to the attachment, he had sold and conveyed the land in good

faith, but the vendee did not put the deed on record until afterward, but did so before a sale of the land under execution, it cannot be held for the debt of the vendor": *Cox* v. *Milner*, 23, Ill. 476; *Savery* v. *Browning*, 18, Iowa, 246; *Reed* v. *Ownby*, 4, Mis. 204; *Thirkell* v. *Patterson*, 18, U. C. R. 75, and especially at page 86; *Wales* v. *Bullock*, 10 C. P. 155; *Fraser* v. *Anderson*, 21 U. C. R. 634. Any land acquired by the defendant, after the Sheriff's return to the attachment could not be taken: *Crocker* v. *Pierce* 31, Maine, 177; nor could his interest as mortgagee simply: *Smith* v. *People's Bank*, 24, Maine, 185; *Lincoln* v. *White* 30, Maine, 291; *Thornton* v. *Wood*, 42, Maine, 282; but under our law the mortgage itself could be seized as a security for money. It does not appear to be necessary to the validity of an attachment of real estate, that the return should specifically state that the property is the defendant's. That will be presumed from the fact of the return: *Johnson* v. *Moss*, 20, Wendell 145. The authority of the sheriff to levy on an attachment continues until the return day of the writ, or until he has actually returned it, if he does so before that day. The fact that before the return day he endorsed on the writ a return of "no property found," but kept the writ in his hands, would not prevent his subsequently levying upon it, and making return of the levy at any time before the return day: *Courtney* v. *Carr*, 6, Iowa, 238. Nothing can be done on the writ after its return day has expired: *Dame* v. *Fales*, 3 N. H. 70; *Bank of Montreal* v. *Taylor*, 15 C. P. 107. For a further discussion of this subject see the notes to section 13.

(*i*) NOT EXEMPT FROM SEIZURE.

The words "not exempt by law from seizure" were not originally in the corresponding clause of the Common Law Procedure Act, nor in the Consolidated Statutes of Upper Canada, chap. 25. Their first introduction is to be found

in the Revised Statute now under consideration. In *Regina* v. *Davidson*, 21 U.C.R., at page 42, Robinson, C. J., is reported as saying in reference to the claim for exemption where the debtor had absconded and proceedings were taken at the instance of the Crown, and goods otherwise exempt were seized: "It is material to consider that in cases of attachment against the goods of absconding debtors there is no exemption." That is true as the law then stood, but with the words in question since introduced, that expression of opinion cannot apply. Whether or not goods otherwise exempt from seizure might, on the authority of an opinion expressed in a previous part of Davidson's case be seized on attachment under the 13th section of this act is a question. However that may be, these words have been inserted for a purpose, and it is submitted that the Legislature intended that attachments should only be issued where the debtor had property in this country beyond that which would be exempt from seizure under execution. As to what is exempt from seizure under execution, see Revised Statutes, chap. 66, Sinclair's D. C. Act, 177. It is to be observed that the 2nd section of chapter 66 of the Revised Statute declares certain goods "exempt from seizure under any writ." As the Statute is entitled "An Act Respecting Writs of Execution," the words which we have just quoted may have reference to writs of that class only, but if so the sheriff might be bound to recognize the exemption on the writ of execution after judgment recovered; see Drake on Attachment, sec. 244, on the subject of exemption from seizure.

(*j*) DEEMED AN ABSCONDING DEBTOR.

When all the necessary circumstances concur the person shall be liable to be proceeded against as an absconding debtor. The Act has given a statutory definition of an absconding debtor, and it is only necessary to shew that the case comes within the requirements of the Act: *In re Wil-*

son and the Quarter Sessions of Huron and Bruce, 23 U. C. R. 301; *Spigener* v. *State*, 62 *Ala.* 383; *Campbell* v. *Barrie*, 31 U. C. R. 285, *et seq.*, per Wilson, J.; *Thompson* v. *Farr*, 6 U. C. R. 390, per Robinson, C. J.

(*k*) PROPERTY MAY BE SEIZED AND TAKEN.

It is necessary that the sheriff make a proper seizure of the debtor's property. As to the seizure of chattel property see Sinclair's D. C. Act, 173, *et seq.* The sheriff cannot make a valid contract for the sale of goods until he has made a proper seizure. *Ex parte Hall. In re Townsend*, 14 Chan. Div. 132. As to seizure generally, also see *Hincks* v. *Sowerby*, 4 App. R. 113; *Consolidated Bank* v. *Bickford*, 7 P. R. 172; *May* v. *Standard Fire Ins. Co.*, 30 C. P. 51; *Craig* v. *Craig*, 7 P. R. 209; *McMaster* v. *Meakin* 7 P. R. 211; *Samis* v. *Ireland*, 4 App. R., at page 140, per Patterson, J.; *Fraser* v. *Page*, 18 U. C. R. 327; *McDougall* v. *Waddell*, 28 C. P. 191. After seizure the sheriff can maintain an action for an injury to the goods by a wrong-doer: *Krehl* v. *Great Central Gas Co.*, L.R., 5 Ex. 289-293, and notes to section 13; and proceedings may be taken against any one in possession of the debtor's property to deliver it up to the sheriff to whom the attachment is directed: *Mullens* v. *Armstrong*, M. T., 2 Vict. When real estate is attached the sheriff should enter and keep possession to give operation to the attachment against strangers: *Doe d. Crew* v. *Clarke*, M. T., 4 Vict. The attachment does not bind the debtor's goods until seizure made: *Potter* v. *Carroll*, 9 C. P. 442; *Kingsmill* v. *Warrener*, 13 U. C. R. 18. As to the duty of the sheriff in seizing under the writ of attachment and the rights acquired by such seizure, see notes to section 13.

PROCEDURE TO OBTAIN WRIT OF ATTACHMENT.

In the Superior Courts.

Proceedings upon affidavit that the defendant has absconded, etc.

2. Upon affidavit (*l*) made by any plaintiff, his servant or agent (*m*), that any such person so departing (*n*) is indebted (*o*) to such plaintiff in a sum exceeding one hundred dollars (*p*), and stating the cause of action (*q*), and that the deponent has good reason to believe (*r*), and does verily believe that such person has departed from Ontario (*s*), and has gone to (stating some place (*t*) to which the absconding debtor is believed to have fled, or that the deponent is unable to obtain any information as to what place he has fled to), with intent to defraud (*u*) the plaintiff of his just dues, or to avoid being arrested or served with process (*v*), and was, at the time of his so departing, (*w*) possessed of real or personal property, credits or effects, not exempt by law from seizure, to his own use and benefit in this Province, and upon the further affidavit of two other credible persons, that they are well acquainted with the debtor mentioned in the first-named affidavit, and have good

Further affidavit.

reason to believe and do believe that such debtor has departed from Ontario with intent to defraud the said plaintiff, or to avoid being arrested or served with process, either of the Superior Courts of Common Law, or any Judge thereof, or the Judge of any County Court, may, by rule or order, (*x*) direct a writ of attachment to issue from either of such Superior Courts, and may in such rule or order appoint the time for the defendant's putting in special bail, which time shall be regulated by the distance from Ontario of the place to which the absconding debtor is supposed to have fled, having due regard to the means of and necessary time for postal or other communication. C. S. U. C. c. 25, s. 2; 40 V. c. 7, *Sched.* A. (102).

Writ of attachment to issue.

(l) THE AFFIDAVIT FOR ATTACHMENT.

As will be seen by a reference to sections 83 and 84 of Drake on Attachment, in the American Courts, the due making and filing of the required affidavit is part of the necessary jurisdiction of the court in attachment cases. It could not be so considered under our statute, as the court or a judge must pass upon the affidavits, and if the attachment is ordered, so long as the order stands, parties could not in collateral or other proceedings go behind it and except to the sufficiency of the affidavits: *Hall* v. *Brown*, 3 P. R. 293; *Buffalo & L. H. Ry. Co.* v. *Hemmingway*, 22 U.C.R. 562; *Voorhees* v. *Bank U. S.*, 10 Peters, 449; *Grignon* v. *Astor*, 2 *Howard*, Sup. Ct., 319. There is a conflict of authority as to whether the affidavit should be entitled in the court or not. The Court

of Common Pleas in *Hart* v. *Ruttan*, 23 C. P. 613; relying on the authority of *Swift* v. *Jones*, 6 U. C. L. J. 63, and *Allman* v. *Kensell*, 8 P. R. 110, held that the affidavit should be entitled in the court in which it is used. The case of *Damer* v. *Busby*, 5 P. R. 356, S. C. 7, L. J., N. S. 182, following *Ellerby* v. *Walton*, 2 P. R. 14, and *Malloy* v. *Shaw*, 6 L. J. N. S. 294, held that it was not necessary to entitle the affidavit in any court. The latest reported case on the subject is *Scott* v. *Mitchell*, 8 P. R. 518, where Armour, J. in Chambers, followed *Ellerby* v. *Walton*, 2 P. R. 147 and declined to follow *Hart* v. *Ruttan*, 23 C. P. 613, and held that affidavits upon which an order for a writ of attachment against an absconding debtor was issued, sworn before a commissioner who appended to his signature the words "A Commissioner in B. R.," &c., were sufficient. In view of this contrariety of decision the safest course would appear to be, to entitle the affidavits simply in the court (see *In re Burrowes*, 18 C. P., at page 500. *The Municipality of Augusta* v. *The Municipal Council of Leeds and Grenville*, 1 P. R. 121; *Smyth* v. *Nicholls*, 1 P. R. 355;) until the question is either settled by statutory enactment or decision of the full court.

The affidavits should not be entitled in any cause as there can be none until the issue of the writ, but the insertion of the style of cause would be merely surplusage: *Hargreaves* v. *Hayes*, 5 E. & B. 272, *In re Burrowes* 18 C. P. 493. This section requires the affidavit to shew not only that the defendant "is indebted to the plaintiff," but also "the cause of action." In cases of arrest it was always necessary to shew a good cause of action in the affidavit. The affidavit for arrest under our present statute, (R. S. O., chap. 67, sec. 5), must show that the plaintiff "has a cause of action" against the person sought to be arrested. From an early date our courts appear to have adopted the same rule, so far as was possible in regard to the statement of cause of action for debts of a similar nature in affidavits for

attachment. The affidavit should follow as nearly as possible the common affidavit of debt for arrest of a debtor. *Anon.* 2, O. S. 292. Where the "two other credible persons" whose affidavits are required by this section reside far from the debtor, they should state the grounds of their belief: *Bank U. C.* v. *Spafford*, 2 O. S. 373. In that case the deponents resided at Brockville, and the debtor at York, (Toronto). The debt should be as certainly sworn to as in an affidavit for an order to hold to bail: *McKenzie* v. *Bussell*, 3 O. S. 345. Where the affidavit stated that the claim was for money lent and advanced to the defendant, without saying *by whom;* it was held defective.—*Ib.* So an affidavit which simply stated that the defendant "was well and truly indebted" to the plaintiff "for money lent and goods sold and delivered," without stating that the money was lent, or that the goods were sold and delivered by the plaintiff to the defendant would be insufficient: *Handley* v. *Franchi*, L. R. 2 Ex. 34; *Cathrow* v. *Hagger*, 8 East 106; *Diamond* v. *Cartwright*, 22 C. P. 494. Where the affidavits stated that the defendant was indebted to the plaintiffs in the amount of certain promissory notes which were described, shewing them to be overdue and held by the plaintiffs, and that the defendant had departed from the Province with intent to defraud the plaintiffs, it was held that the cause of action was sufficiently stated: *Wakefield* v. *Bruce*, 5 P. R. 77. The affidavit must shew that the defendant is a resident of the Province: *Higgins* v. *Brady*, 10 U. C. L. J. 268. In the same case it was held that it was not sufficient to describe the debtor as "lately doing business" in Upper Canada. Wilson, J., at page 269 of the report, says: "This affidavit describes the debtor as 'lately doing business in Chatham,' etc.; but all this might be true, and yet the debtor never have been in Canada in his life." In that case it was also held that the question of residence was not established by the use of the words that the debtor "has

departed from Canada and gone to the United States." The same learned Judge says on that point: "But all this may be true, and yet the debtor may never have been more than five minutes in Canada." It is not necessary that the plaintiff should swear that the debtor was residing within the Province if that fact is sworn to by other persons: *Wakefield* v. *Bruce*, 5 P. R. 77. It is sufficient to shew that the debtor intends to defraud the plaintiff without shewing an intention to defraud creditors generally.—*Ib.* The affidavit must shew that the defendant is a resident of the Province, *and* is possessed of real or personal property therein; see *Hart* v. *Ruttan*, 23 C. P. 613, and notes to section 1. In the case just cited the defendant stated in his affidavit filed on the application to set aside the attachment that he was a resident, and possessed of property, and it was left undecided, whether or not such statement covered that omission in the plaintiff's affidavit, but the Court refused under the circumstances to set aside the writ for want of such statement in the plaintiff's affidavit; see also Drake on Attachment, section 90, (*a*).

If proceedings by attachment are taken on a bill of exchange, it must appear expressly by the affidavits or can fairly be deduced from them, that the bill is overdue: *Edwards* v. *Dick*, 3 B. & Ald. 495; *Racey* v. *Carman*, 3 U. C. L. J. 204; *Pawson* v. *Hall*, 1 P. R. 294; *Ross* v. *Hurd*, 1 P. R. 158; Drake on Attachment, section 28, *et seq.* The affidavit must be such as perjury can be assigned on it if false; and whatever is necessary to show the plaintiff's right of action, must be expressly stated, per Vaughan B, in *Townsend* v. *Burns*, 2 C. & J. at page 471, but express or precise words are not necessary, per Dallas, C. J. in *Skeen* v. *Macgregor*, 8 Moore 108. The affidavit of debt ought to be certain and explicit and nothing left to intendment: *Fricke* v. *Poole*, 9 B. & C. 543. The affidavit should be direct and positive as to the existence

of the debt, and not merely argumentative: *Sheldon* v. *Baker*, 1 T. R. 83; *Wheeler* v. *Copeland*, 5 T. R. 364. "The cases of assignees, executors, etc., are by way of exception to that rule: then a party claiming under that exception must shew a case where it has been allowed. In those cases if he swears that *he believes it to be true*, it is as much as he can do, because the transaction in general does not come within his own knowledge," per Buller J. in *Sheldon* v. *Baker*, 1 T. R. at page 84; see also *Swayne* v. *Crammond*, 4 T. R. 176. When the claim is on promissory notes it is not necessary to shew to whom the notes were payable; if the plaintiff is shewn to be the holder: *Jones* v. *Gress*, 25 U. C. R 594. The affidavit should shew a complete cause of action in itself without reference to books or other papers: *Powell* v. *Portherch*, 2 T. R. 55; *Williams* v. *Jackson*, 3 T. R. 575. Where it is impossible to swear positively, as where the cause of action arose from the nonpayment of bills at a distance or in a foreign country, it is sufficient for the party to swear that they were not paid "to his knowledge and belief" there or elsewhere: *Hobson* v. *Campbell*, 1 H. B. 245. Where the affidavit is made by a surviving partner, it should show that the other partner is dead: *Edgar* v. *Watt*, 1 H. & W. 108. The affidavit on a bill or note should shew that it is unpaid: *Kirk* v. *Almond*, 2 C. & J. 354, or some other circumstance from which that fact may be presumed, such as the date or time of acceptance, and at what period the note was payable, or that it was payable on demand, or on a day past or the like: *Kirk* v. *Almond* (*supra*); *Jackson* v. *Yate*, 2 M. & S. 148; but it is not necessary otherwise to state the date: *Shirley* v. *Jacobs* 3 Dowl. 101; *Irving* v. *Heaton*, 4 Dowl. 638. Where a note is payable by instalments the affidavit should shew what instalments are due: *Hart* v. *Myerris*, 3 Tyr. 228. An affidavit stating that the debtor was indebted in a certain sum, upon the balance of a bill drawn by the creditor and accepted by the debtor, and due at a

day past, would be sufficient: *Walmésley* v. *Dibdin*, 4 M. & P. 10. Intermediate indorsements on a bill or note need not be stated: *Luce* v. *Irvin*, 6 Dowl. 92; Byles on Bills, chap. 11. In an action against the drawer of a bill, the affidavit must shew presentment and notice of dishonor: *Simpson* v. *Dick*, 3 Dowl. 731; *Witham* v. *Gompertz*, 4 Dowl. 382, is to the contrary, but the later case of *Hopkinson* v. *Salembier*, 7 Dowl. 493, reiterates the same doctrine. An affidavit for interest must either shew an express contract for it, or that it is otherwise recoverable by law: *Neale* v. *Snoulten*, 2 C. B. 320; *Pawson* v. *Hall*, 1 P. R. 294. But it need not state when the interest began to run: *White* v. *Sowerby*, 3 Dowl. 584. It is not necessary to allege that money was lent or goods sold or delivered to the defendant *at his request: Victors* v. *Davis* 1 D. & L. 984; *Rowley* v. *Bayley*, 11 Moore 383; *Ellerby* v. *Walton*, 2 P.R. 147; *Ogilvie* v. *Kelly*, 4 U. C. R. 393. But on a claim for work and labor, a request must appear: *Hall* v. *Brush*, T. T. 3 and 4 Vict. Where there are several promissory notes, the amount of each note should be mentioned: *Ross* v. *Hurd*, 1 P. R. 158. But see *McIntyre* v. *Brown*, 4 U. C. L. J. 85. Where some of the causes of action are properly stated and others not, the affidavit is good as to the former: *Ross* v. *Hurd* (*supra*). The affidavit could not be made nor the writ issued on a Sunday: *Hall* v. *Brush* (*supra*). Drake on Attachment, sec. 187. Where there are several claims mentioned in the affidavit, the affidavit should shew an intent to defraud as to all: *Brown* v. *Palmer*, 3 U. C. R. 110; see also *McKenzie* v. *Reid*, 1 U. C. R. 396, and *Barry* v. *Eccles*, 2 U. C. R. 383. Should there be any variance between the affidavit and the order, the latter would probably be amended, and a defect in the affidavit might be allowed to be supplied by further affidavits: *Robertson* v. *Coulton*, 9 P. R. 16; *Damer* v. *Busby*, 5 P. R. 356; *Ross* v. *Hurd*, 1 P. R. 158; *Brett* v. *Smith*, 1 P. R. 309.

The defects in the plaintiff's affidavits may be supplied by what appears in the defendant's affidavits filed on an application to set aside the writ: *Reg.* v. *Stewart*, 8 P. R. 297; Drake on Attachment, sec. 90 (*a*). An objection to the form of the affidavit must be made before the time for putting in special bail expires: *Palmer* v. *Rodgers*, 6 U. C. L. J. 188; see, also, *Racey* v. *Carman*, 3 U. C. L. J. 204. From the case of *Quackenbush* v. *Snider*, 18 C. P. 196, one would be disposed to think that if the affidavit included *all* the alternatives of the statute, it would be bad; but *Higgins* v. *Brady*, 10 U. C. L. J. 268, is an authority to the contrary. In that case one of the alternatives shewed a sufficient cause of action. The current of American authority, though not uniform, is against the validity of an affidavit alleging one *or* the other of two or more distinct grounds for the issue of an attachment. In Drake on Attachment, at sections 101 and 102, it is thus laid down:—"Usually the plaintiff may allege as many grounds of attachment, within the terms of the law, as he may deem expedient. In doing so, the several grounds should be stated cumulatively; and if any one of them be true, it will sustain the attachment, though all the others be untrue. An affidavit alleging one *or* the other of two or more distinct grounds, would be bad, because of the impossibility of determining which is relied on to sustain the attachment. Thus, under a statute which authorized an attachment—(1) Where the defendant is about to remove his effects; (2) Where he is about to remove privately out of the country; and (3) When he absconds or conceals himself, so that the ordinary process of law cannot be served on him; an attachment was obtained, on an affidavit that the defendant "was about to remove from and without the limits, or so absconds and conceals himself, that the ordinary process of law cannot be served on him"; and it was set aside. The first member of the oath was plainly not within the statute, and though the latter

was, yet it was rendered inefficient by its connection with the former, through the disjunctive conjunction *or*, whereby it became uncertain which state of facts existed. Subsequently, the same court, in a similar case, so ruled again, and intimated that they would consider an affidavit in the disjunctive, as bad, although either of the facts sworn to might be sufficient.

"Let it be observed, however, that where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction just mentioned would be inapplicable. For instance, where the statute authorized an attachment when 'the defendant absconds or secretes himself,' it was considered that, from the difficulty of determining which was the fact, the language comprised but one ground, and the disjunctive *or* did not render the affidavit uncertain. 'It is,' said the court, 'often difficult, if not impracticable, for the creditor to ascertain whether his debtor absconds or secretes himself; he has to rely frequently upon such information as his family or friends will give him, which cannot always be confided in. Hence, to allow sufficient latitude to the creditor in making his affidavit, and to prevent failures, from having mistaken the cause why the debtor is liable to the remedy, the law has very properly provided for its issuance in the alternative.'

"Under a similar statute, the same view has been expressed in Tennessee. The language of the statute was, 'so absconds or conceals himself that the ordinary process of law cannot be served on him.' It was contended that 'absconds' constituted one cause, and 'conceals' another; but the court did not so hold. 'For,' said the court, 'although the two words are connected by *or* instead of *and*, yet the sense of the sentence shows that *or* is used

copulatively, constituting both 'absconds' and 'conceals,' or either of them, a sufficient cause for suing out the attachment. In the nature of things, a plaintiff cannot tell whether a party absconds or conceals himself. He may suppose he absconds, when he only conceals himself, and *vice versa*. To compel him to swear that the party is doing the one only, would involve the plaintiff in endless difficulty. Besides the question of conscience that must always exist with the party about to take the oath, he would be constantly in danger of having his attachment abated on the plea of the defendant, who, though he might not have absconded, was nevertheless concealed, or, if not concealing himself, may have been absconding. We think, therefore, that the words 'so absconds or conceals himself' constitute but one cause." And so, in Mississippi, under a statute allowing attachment on affidavit that the defendant "hath removed, or is removing out of the State, or so absconds, or privately conceals himself, that the ordinary process of law cannot be served on him." The affidavit was in the very words of the statute, and was objected to, because in the alternative; but the court held it sufficient, considering that the material point required by the statute was, that the ordinary process could not be served, and that the plaintiff might well know that, without knowing whether the defendant had removed, absconded or concealed himself. And in New York, an affidavit that the defendant "had secretly departed from this State, with intent to defraud his creditors, or to avoid the service of civil process, or keeps himself concealed therein with the like intent," was sustained. And in Wisconsin, an affidavit was considered good, which alleged that the defendant "has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, his property, with intent to defraud his creditors."

The affidavit need not be in the exact words of the statute,

a substantial compliance with it is sufficient: *Theirman* v. *Vahle*, 32 Indiana 400. The duty of the judge appears to be, not to decide whether the alleged facts are true or not, but whether they are sworn to. If sworn to, he is fully justified in ordering the proce ss to be issued, and cannot be affected by the subsequent ascertainment of the groundlessness or falsity of the affidavit: *Wheeler* v. *Farmer*, 38 Cal. 203. In some of the American cases, the *grounds* of the deponent's belief were held necessary to be stated, so that their sufficiency might be determined by the officer issuing the writ, Drake on Attachment, 100; but our statute does not appear to require the affidavit to shew the grounds of belief, and to follow its words would be sufficient, Drake, sec. 107. Uncertainty in a material and necessary allegation in the affidavit will vitiate it, Drake, section 104; but surplusage not inconsistent with the substantial averment required by the statute will not, Drake, section 105. "All the elements of positiveness, knowledge, information, or belief, conjointly or separately, required by statute, should appear in the affidavit, or be substantially included in its terms; or it will be bad," Drake, sec. 106.

In an action against two joint debtors if the affidavit be insufficient as to one of them it will not authorise an attachment against the property of both: *Hamilton* v. *Knight*, 1 Blackford 25. The power of amendment owing to a defective affidavit is entirely of statutory creation, Drake, secs. 87 and 113; and in amended affidavits the obligations must relate to the time of suing out the attachment. If they refer only to the existence of the ground for attachment when the amendment is made, they will not sustain the writ: *Crouch* v. *Crouch*, 9 Iowa, 269; *Wadsworth* v. *Cheeny*, 10 Iowa, 257.

It will be observed that the writer has adhered to the analogy of proceedings to hold to bail as expressed by Robinson, C.J., in the anonymous case mentioned in

2 O. S. 292: in *McKenzie* v. *Bussell*, 8 O. S. 345; in *Clock* v. *Alfield*, 5 O. S. 504, and adopted by Hagarty, C.J., in *Hart* v. *Ruttan*, 23 C. P., at page 615.

In practice it may be found that in some cases a close analogy cannot be maintained; see *Howland* v. *Rowe*, 25 U. C. R. 467; *Robertson* v. *Coulton*, 9 P. R. 16; but it is submitted that the practice, in regard to orders to hold to bail and for attachments are in very many respects the same. The plaintiff's affidavit must show that he is *the creditor* in the particular case: *Handley* v. *Franchi*, L. R. 2, Ex. 34; *Rogers* v. *Crookshank*, 4 L. J., N. S. 45; *Diamond* v. *Cartwright*, 22 C. P. 494. One of several plaintiffs could, it is submitted, make the affidavit: *Balkwell* v. *Beddome*, 16 U. C. R. 203; *Heward* v. *Mitchell*, 11 U. C. R. 625; *McLeod* v. *Fortune*, 19 U. C. R. 100. An affidavit, made by the president or other principal officer of a corporation, would probably be considered as made by the plaintiff: *Bank of Toronto* v. *McDougall*, 15 C. P. 475; *Trenton Banking Co.* v. *Haverstick*, 6 Halsted, 171. In Drake on Attachment, sec. 87, it is said that, "There can be no doubt that a corporation, as well as a natural person may sue by attachment, though the statute may require the affidavit to be made by the plaintiff, without mentioning any other person by whom it may be made. The law which gives existence to the corporation, and which allows it to sue and be sued, necessarily confers on it the authority to act through its agents in any such matter."

Where several persons are liable for the same debt, the creditor may proceed by attachment against any one or more of them in relation to whom any ground of attachment exists, without proceeding against the others: *Chittenden* v. *Hobbs*, 9 Iowa, 417; *Austin* v. *Burgett*, 10 Iowa, 302. No advantage can be taken to the affidavit after verdict, where the defendant appears and pleads to the merits, nor by demurrer, Drake, sec. 86.

(*m*) BY SERVANT OR AGENT.

The affidavit should properly show, in a distinct paragraph and not by way of description, that the deponent is the servant or agent (as the case may be), of the plaintiff for the purpose proposed: *Hood* v. *Cronkite*, 4 P.R. 279. If the affidavit does not show that the deponent is "servant" or "agent" of the plaintiff, it will be bad, Drake on Attachment, sec. 94.

(*n*) PERSON DEPARTING.

This has reference of course to the absconding debtor. It may be read as the person "who has departed;" see notes (*b*) and (*f*) to section 1.

(*o*) IS INDEBTED.

As to the nature of a claim for which an attachment can issue; see note (*d*) to section 1.

(*p*) AMOUNT EXCEEDING $100.

The Division Court has jurisdiction up to $100, and in certain cases to $200, and this statute is intended to make provision for cases beyond either sum. It will be observed that the 190th section of the Division Court Act applies to claims "for any debt or damages arising upon *any* contract, express or implied," which this statute does not. By section 4, of "the Division Courts Act, 1880," the provision in respect to increased jurisdiction of these courts is extended to proceedings against absconding debtors; see *Sinclair's D. C. Act*, 1880, 13 note (*g*).

(*q*) CAUSE OF ACTION.

The cause of action must be stated. As to what causes of action are within this Act, and the proper manner of stating them; see note (*d*) to sec. 1.

(r) HAS GOOD REASON TO BELIEVE.

1. An affidavit that the plaintiff had reason to believe and not "*good* reason to believe" would be insufficient: *Meyers* v. *Campbell*, 1 Cham. R. 31 per Macaulay, J. If a statute requires a fact to be sworn to in direct terms, it is not complied with by a party's swearing that he is "informed and believes" the fact to exist: *Ex parte Haynes*, 18 Wendell 611; *Cadwell* v. *Colgate*, 7 Barbour 253; *McLaren* v. *Sudworth*, 4 U. C. L. J. 233. Under a statute authorizing an attachment "where there is good reason to believe" the existence of a particular fact, an affidavit that "it is the plaintiff's belief" that the fact existed, was held insufficient; he should have stated that he had good reason to believe and did believe it: *Stevenson* v. *Robbins*, 5 Missouri 18. If the affidavit omitted to state either that the plaintiff had good reason to believe, or did verily believe the facts necessary to be deposed to, it would be insufficient: *Cobb* v. *Force*, 5 Alabama 468. Where a party was required to swear "to the best of his knowledge and belief," and he swore only to the best of his belief, the affidavit was held bad: *Bergh* v. *Jayne*, 7 Martin N. S. 609; so where he was required to swear that he "verily believes," and he swore "to the best of his knowledge and belief" the affidavit was declared insufficient: *Stadler* v. *Parmlee*, 10 Iowa 23. Where deponent was required to state that the facts were within his personal knowledge, or that he is informed and believes them to be true, a positive oath of the facts was held sufficient, though he did not add that he had personal knowledge of them or believed them to be true; it being considered that the positive oath implied both: *Jones* v. *Leake*, 11 Smedes & Marshall 591. And so a statute requiring an affidavit "shewing" the existence of a certain fact, it was held that an affidavit of such fact as the deponent "verily believed" was good, which was in effect deciding that the

party's belief was a sufficient "shewing" to fulfil the terms of the statute: *Trew v. Gaskill*, 10 Indiana 265; *McNamara* v. *Ellis*, 14 Indiana 516. The safest course is to follow the exact words of the statute; see *Jackson* v. *Kassel*, 26 U. C. R. 341.

(*s*) DEPARTED FROM ONTARIO.

This of course is a necessary allegation, as to which see note (*f*) to section 1.

(*t*) WHERE DEBTOR HAS GONE.

As has been already remarked, a departure from Ontario to any other Province, would be within the Act. It is not necessary that the debtor should go to a foreign country. This part of the section presupposes inquiry as to where the debtor has gone, which it would always be best to make, and if his post-office address is ascertained, it should be stated, so that the order to proceed, might provide for mailing papers to him.

(*u*) WITH INTENT TO DEFRAUD.

This is the chief ground of the debtor's offending, and for a discussion of which see note (*g*) to section 1.

(*v*) TO AVOID ARREST OR SERVICE OF PROCESS.

It will be observed that the intent is complete if any *one* of the alternatives is made out. The writer has only to repeat what has been said in note (*l*) to this section, that in view of the apparently contradictory state of the cases it will be safer not to insert in the affidavit the different cases of intent in the *alternative;* but the affidavit would not be open to objection if the allegation was that the debtor had absconded with intent to defraud *and* to avoid being arrested or served with process. To avoid being arrested or served with process appears to be one alternative only; see Drake on Attachment, sec. 102, and cases there cited. As to when

a debtor may be arrested and the facts necessary to be shewn; see R. S. O., chap. 67, R. & J's Digest, 188, 213, 4234. It is submitted that the word "process" here means any writ issued with a view of obtaining judgment against the debtor for the satisfaction of the creditor's claim.

(*w*) FURTHER AFFIDAVITS.

The affidavit of each of the two other credible persons is intended to be corroborative of the affidavit of the "plaintiff, his servant, or agent." It should shew the same intent as the former affidavit, and be governed by the same rules of law; see note (*l*) to this section. Every person who is *compos mentis* is now a "credible" witness. For form of this affidavit, see Appendix.

(*x*) ORDER FOR ATTACHMENT.

The order will only be granted on the affidavit's complying with the requirements of the Act. It should provide for the time within which the debtor is allowed to put in special bail. Of course the greater the distance and the more difficult or tedious the means of postal or other communication, the greater the time allowed.

In County Courts.

3. In case the sum claimed is within the jurisdiction of the County Courts (*y*), any such Court or the Judge or acting Judge thereof, may in like manner, by rule or order direct a writ of attachment to issue from such Court, and the proceedings thereon shall be the same as in this Act provided. C. S. U. C. c. 25, s. 4.

In cases within County Court jurisdiction Judges to order writs to issue.

(*y*) COUNTY COURT JURISDICTION.

It will be observed that the practice of the Superior Courts is applied to the County Courts.

By the 19th section of the County Courts' Act (Revised Statutes of Ontario, chap. 43) the jurisdiction of these Courts is defined as follows:

"Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction and hold plea:

1. In all personal actions where the debt or damages claimed do not exceed the sum of two hundred dollars;

2. In all causes and suits relating to debt, covenant and contract, to four hundred dollars, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant;

3. To any amount on bail-bonds given to a sheriff in any case in a County Court, whatever may be the penalty; and

4. On recognizances of bail taken in a County Court, whatever may be the amount recovered or for which the bail therein may be liable. C. S. U. C. c. 15, s. 17.

Rev. Stat. c. 53.

5. In actions of replevin where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of two hundred dollars, as provided in "*The Replevin Act.*" See C. S. U. C. c. 29, s. 3.

Rev. Stat. c. 54.

6. In interpleader matters, as provided by "*The Interpleader Act.*" See 27 V. c. 14, s. 3.

It must, however, be carefully kept in mind that it is only *for a debt* that an attachment can be issued; see note (*d*) to section 1.

As to debts within the jurisdiction of County Courts, see *Billings* v. *Nicolls*, 5 U. C. R. 622; *Montford* v. *McNaught*, 3 U. C. L. J. 15; *McMurtry* v. *Munro*, 14 U. C. R. 166; *Wallbridge* v. *Brown*, 18. U. C. R. 158; *Furnival* v. *Saunders*, 26 U. C. R. 119, S. C. 2 L. J., N. S. 245; *Fleming* v. *Livingstone*, 6 P. R. 63. *In re Dixon* v. *Snarr*, 6 P. R. 336; *Swartout* v. *Skead*, 11 L. J. N. S. 329; *Watson* v. *Severn*, 6 App. R. 559.

WRIT OF ATTACHMENT AND SUMMONS.

4. The writ of attachment shall also contain a summons to the absconding debtor, and shall be in the form given (*z*) in the Schedule to this Act. C. S. U. C. c. 25, s. 5. Contents of.

(*z*) FORM OF ATTACHMENT.

The Statute gives a form of writ, which, like other statutory forms, will be sufficient to follow: *In re Allison*, 10 Ex. 561: *In re Wilson* v. *Q. S. of Huron and Bruce*, 23 U. C. R. 301; *Thompson* v. *Farr*, 6 U. C. R., at page 390. Any irregularity in the attachment would under the general power of amendment be amended almost as a matter of course. If the writ be in legal form, and issued from a court having competent jurisdiction, it will be a complete justification to the Sheriff or his officer in attaching the defendant's property, and in using to effect the attachment, all necessary force; and there can therefore be no obligation on him to investigate whether the preliminary steps required for obtaining it have been pursued: *Fulton* v. *Heaton*, 1 Barbour 552; *Booth* v. *Rees*, 26 Illinois 45; *State* v. *Foster*, 10 Iowa 435.

Although the process may be erroneous and voidable, that fact will neither prevent him from protecting himself by it nor justify him in omitting to do his duty in its execution: Watson on Sheriff, 67, 68 and 69; *Stevenson* v. *McLean*, 5 Humphreys 332; *Reams* v. *McNail*, 9 Humphreys 542. Nor has he anything to do with the question whether the debt is actually due. It may be that no cause of action exists;

but with that he has no concern: for it is not his province to decide the question of liability between the parties: *Livingstone* v. *Smith*, 5 Peters 90; *Mamlock* v. *White*, 20 California 598; *Ockford* v. *Freston*, 6 H. & N., at p. 472. But if the Court had no power to issue the writ, the Sheriff would, if aware of the fact, be a trespasser if he seized under it, for it would be a void process: R. & J's. Digest, 3525 *et seq.*; *Warmoll* v. *Young*, 5 B. & C. 663; *Imray* v. *Magnay*, 11 M. & W. 267; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.

When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment in legal form; but when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder. *Damon* v. *Bryant*, 2 Pickering 411; *Rinchey* v. *Stryker*, 28 New York 45; *Sexey* v. *Adkinson*, 34 California 346, *King* v. *Macdonald*, 15 C. P. 397; *Roblin* v. *Mocdie*, 15 U. C. R. 185; *Anderson* v. *McEwan*, 8 C. P. 532; *Barragan* v. *Sherwood*, 11 C. P. 119.

If a writ of attachment is placed in the hands of a person specially deputed to execute it, he has all the powers which may be exercised by the Sheriff in the premises, but he is not entitled of right to be recognized or obeyed as a Sheriff, but must shew his authority and make known his business, if required by the party who is to obey that authority. He can equally with the Sheriff break into a warehouse to get access to the goods where admittance is refused him: *Burton* v. *Wilkinson*, 18 Vermont 186; but if he broke into a dwelling-house for the purpose the seizure would be void and the Sheriff would be held liable as a trespasser: Watson on Sheriff, 44; *Attack* v. *Bramwell*; 3 B. & S. 520; *Nash* v. *Lucas*, L. R. 2 Q. B. 590; *Anglehart* v. *Rathier*, 27 C. P. 97; see further on this subject in the notes to section 13.

5. Every such writ shall be dated (*a*) on the day on which it is issued, and shall be in force for six months from its date, (*b*) and may be renewed for the purpose of effecting service on the defendant, in like manner as a writ of summons may be renewed (*c*) under "*The Common Law Procedure Act.*" C. S. U. C. c. 25, s. 6. Rev. Stat. c. 50.

(*a*) To be dated on day of issue and to be in force six months.

(*a*) WRIT TO BE DATED ON DAY OF ISSUE.

Formerly all writs had to be tested in term; (see the cases cited in *Fisher* v. *Grace*, 28 U. C. R. 312;) but in regard to most writs this has been changed by statute.

(*b*) IN FORCE FOR SIX CALENDAR MONTHS.

The writ is to be in force for six calendar months "from its date." The day of issue is excluded: *Young* v. *Higgon*, 6 M. & W. 49; *Weeks* v. *Wray*, L. R. 3, Q. B. 212; *McCrea* v. *Waterloo M. F. Ins. Co.*, 26 C. P., page 437, in appeal, 1 App. R. 218: *Lawford* v. *Davies*, L. R. 4, P. D. 61; *Clarke* v. *Garrett*, 28 C. P. 75. An attachment issued on the *first* day of February would, therefore, expire if unrenewed at twelve o'clock at night on the first of August, following.

If the last day was a Sunday the writ would, as the law formerly stood, expire that day: *Rowberry* v. *Morgan*, 9 Ex. 730; *Peacock* v. *The Queen*, 4 C. B. N. S., 264; *Wynne* v. *Ronaldson*, 12 L. T. N. S., 711; *Hughes* v. *Griffiths*, 18 C. B. N. S., 324; *Ex parte Ferrige. In re Ferrige*, L. R. 20, Eq. 289; *Ex parte Viney. In re Gilbert*, 4 Chan. D. 794; *Ex*

parte Saffrey. In re Lambert, 5 Chan. D. 365; *McLean* v. *Pinkerton*, 7 App. R. 490. But now it could be renewed on the next day the offices were open, under the 457th Rule of the Judicature Act. Should the writ be allowed to expire before service, or what might under the 8th section be deemed service, all proceedings under it would fall to the ground, and should any property have been attached the right to further detain it would be at an end: *Weston* v. *Thomas*, 6 U. C. L. J. 181; *Gardiner* v. *Juson*, 2 E. & A. 188; Drake on Attachment 187 (*b*), nor could the Court or Judge extend the time for renewal: *Barker* v. *Palmer*, 8 Q. B. D. 9. *Ex parte Williams; Re Jones*, 46 L. T. N. S. 237.

(*c*) RENEWAL OF ATTACHMENT.

As has been shewn in the last note the writ will expire unless renewed. The renewal is to be "in like manner" as a writ of summons is to be renewed under the Common Law Procedure Act. Under the 27th sec. of that Act a writ may be renewed "from time to time." So also may a writ of attachment be renewed from time to time, but it can only be done *during the currency* of the writ.

6. Every writ of attachment shall issue in duplicate, (*d*) and shall be so marked by the officer issuing the same (the costs of suing out the same being allowed only as if a single writ issued) and one writ shall be delivered to the Sheriff to whom the same is directed, and the other shall be used for the purpose of effecting service on the defendant. C. S. U. C. c. 25, s. 7. Writ of attachment to issue in duplicate.

(*d*) TO ISSUE IN DUPLICATE.

The words are imperative, and the clerk has no discretion. The writ must be issued according to this statute, Ontario J. Act, Rule 4. In Toronto the writ was held to have been properly issued by the Clerk of the Process: *Wakefield* v. *Bruce*, 5 P. R. 77. As to service on the debtor, see the notes to sec 8.

Plaintiff may obtain concurrent writs to other Sheriffs.

7. The plaintiff may, at any time within six months from the date of the original writ of attachment, without further order from the Court or a Judge, issue from the office whence the original writ issued, one or more concurrent writ or writs (*e*) of attachment, to bear teste on the same day as the original writ, and to be marked by the officer issuing the same with the word "*Concurrent*" in the margin, which concurrent writ or writs of attachment may be directed to any Sheriff (*f*) other than the Sheriff to whom the original writ was issued, and need not be sued out in duplicate or be served on the defendant, but shall operate merely for the attachment of his real or personal property, (*g*) credits, or effects in aid of the original writ (*h*). C. S. U. C. c. 25, s. 10.

For attaching property.

(*e*) CONCURRENT WRITS MAY ISSUE.

The plaintiff may "at any time" within six months from the date of the original attachment, without any further order, issue one or more concurrent writ or writs. As to the calculation of time within which concurrent writs may be issued, see note (*b*) to sec. 5. The clerk would

issue the concurrent writ or writs on præcipe. It would expire with the original writ of attachment.

(*f*) DIRECTED TO ANY SHERIFF.

The concurrent writ must, it will be observed, be directed to some Sheriff *other* than the one to whom the original writ was addressed. It means, of course, the Sheriff of some County or District in this Province. As to the duties of the Sheriff, under a writ of attachment, see the notes to secs. 4 and 18.

(*g*) OPERATES TO ATTACH PROPERTY.

The object of this provision appears to be to afford the means of seizing and taking property in as many counties in the Province as a debtor may have property therein. It is submitted that the Sheriff must, under a concurrent writ, attach, if possible, property in the same way as would be done under an original writ, by virtue of sec. 13, and after seizure of same he must deal with it in the same manner as he would under an original writ.

(*h*) SETTING ASIDE ATTACHMENT.

It will be observed that an application to set aside an order to hold to bail, and the writ of capias issued upon it, but not to discharge the defendant from custody, must be made to the court: *Damer* v. *Busby*, 5 P. R. 356; *Robertson* v. *Coulton*, 9 P. R. 16. Yet an application to set aside an order for attachment made by a Judge may be made to the court or any other Judge: *Howland* v. *Rowe*, 25 U. C. R. 467; *Jackson* v. *Randall*, 24 C. P. 87. The court refused to set aside an attachment upon the ground that the debtor had been previously held to bail for the same cause of action, and the bail had been discharged by a reference to arbitration: *Mosier* v. *McCan*, 3 O. S. 77. Should a

plaintiff not proceed within the time prescribed by the practice of the court his proceedings would be set aside: *Bank of U. C.* v. *Spafford*, 3 O. S. 78.

Undue delay in moving would be a bar to the application to set aside the writ: *Fisher* v. *Beach*, 4 O. S. 118; R. & J.'s Digest, 2910. Where an action against an absconding debtor had been carried to judgment and execution against his lands, and he moved to set aside the execution for a variance between it and the judgment, and the plaintiff was allowed to amend; held, that the defendant was afterwards too late to object to irregularities in earlier proceedings, as he should have brought them forward on his first motion: *Dougall* v. *Lewis*, T. T. 5 & 6 Vict.

A person seeking to set aside an attachment against him on the ground that he never lived, nor was in this country, so as to make him come under the Absconding Debtor's Act, should make these facts appear clearly; see note (*g*) to sec. 1; and the court discharged the rule where those facts were not distinctly made out, and the party had not described himself in his affidavit as the defendant in the suit: *Smith* v. *The Niagara Harbour and Dock Co.* 6 O. S. 555. In *Jackson* v. *Randall*, 6 P. R., at page 169, Wilson, J. says: "I firmly believe the court and a judge, particularly, should be cautious as to all interference with the rights of a creditor, for the abuse of which he is specially answerable to the party injured, unless the cause for such interference be well established, and it would be a denial of justice not to interpose." It was also held in that case that a judge may order a seizure on a writ improperly issued to be abandoned, and the goods delivered up to the person or custody from whom or from which they were taken, the writ of attachment standing as an ordinary process. This decision in Chambers was sustained by the full court on Appeal (24 C. P. 87) where it was also held that in the absence of any express provision in the Act for setting aside

a writ of attachment against an absconding debtor did not prevent the court from doing so, in the exercise of its common law power over its own process; and that such power could also be exercised by a Judge in Chambers as the delegate of the Court.

A mere stranger could not move to set aside an attachment, but another creditor in the case of fraud: *Balfour* v. *Ellison*, 8 U. C. L. J. 330; or, where proceedings had been taken against an absconding debtor contrary to the provisions of the statute: *Montreal Bank* v. *Burnham*, 1 U. C. R. 131, could make the application.

As to the liability of a creditor for the improper issue of an attachment the cases are not numerous. The statement of claim should charge that the proceedings were taken maliciously and without reasonable or probable cause. On the question generally, see *Owens* v. *Purcell*, 11 U. C. R. 390; *Crawford* v. *McLaren*, 9 C. P. 215; *Hood* v. *Cronkite*, 29 U. C. R. 98; *Fisher* v. *Holden*, 17 C. P. 395; *Johnson* v. *Emerson*, L. R. 6 Ex. 329; *Castrique* v. *Behrens*, 3 E. & E. 709; but it is unnecessary to allege that the proceedings terminated in the plaintiff's favour: *Bishop* v. *Martin*, 14 U. C. R. 416; *Fahey* v. *Kennedy*, 28 U. C. R, 301; *Eakins* v. *Christopher*, 18 C. P. 532; *Gilding* v. *Eyre*, 10 C. B. N. S. 592. If the attachment is set aside as improperly issued, an action could be maintained against the person obtaining it as a trespasser: *Eaton* v. *The Gore Bank*, 27 U. C. R. 490.

As to the termination of proceedings before action where such is necessary to be proved; see *Basebé* v. *Matthews*, L. R. 2, C. P. 684; *Redway* v. *McAndrew*, L. R. 9, Q. B. 74; *Huffer* v. *Allen*, L. R. 2, Ex. 15; *Griffith* v. *Ward*, 20 U. C. R. 31; *Palk* v. *Kenney*, 11 U. C. R. 350; *Gunn* v. *Cox*, 3 Sup. R. 296. The onus is on the plaintiff of shewing malice and want of reasonable and probable cause: *Hicks* v. *Faulkner*, 8 Q. B. D. 167. This last case points out clearly the functions of Judge and Jury in such cases.

PROCEDURE AFTER SERVICE OF WRIT.

Further proceedings after service, &c.

8. In case it is shewn by affidavit (*i*) to the Court or a Judge having jurisdiction (*j*) in the case, that a copy of the writ was personally served (*k*) on the defendant, or that reasonable efforts (*l*) were made to effect such service, and that such writ came to his knowledge (*m*), or that the defendant has absconded in such a manner that after diligent inquiry (*n*) no information can be obtained as to the place he has fled to, such Court or Judge, if the defendant has not put in special bail may either require some further attempt (*o*) to effect service or may appoint some act to be done which shall be deemed good service (*p*), and thereupon, (or on the first application, if the Court or Judge thinks fit) such Court or Judge may authorize (*q*) the plaintiff to proceed in the action in such manner and subject to such conditions as the Court or Judge may direct or impose. C. S. U. C. c. 25, s. 8.

(*i*) BY AFFIDAVIT.

The affidavit may be made by any one who knows the facts. For form of affidavit, see Appendix.

(*j*) APPLICATION TO COURT OR JUDGE.

No question can arise in Superior Court cases where the application is made in Chambers in Toronto, or in County Court cases where the application is made to the Judge or Junior Judge of the Court, nor to a Deputy Judge where he has power to act (Con. Stat. U. C. chap. 15, sec. 8, and Rev. Stat. chap. 42, sec. 7), but in Superior Court cases who is the "Judge having jurisdiction in the case?" The power conferred on Judges of the County Courts in such cases is simply a statutory one and confined to the mere ordering of the writ of attachment to issue, and has no reference to the power to be exercised under the 8th section. The power of a County Court Judge to make an order in Superior Court cases under that section, it is submitted, is to be found in section 76 and Rules 420, 422 and 423 of the Ontario Judicature Act. In the cases therein mentioned it is submitted a Judge of the County Court would, as Local Judge of the High Court, have power to grant the order to proceed under this section: *Williams* v. *Mercier*, 9 Q. B. D. 337.

(*k*) WRIT PERSONALLY SERVED.

As to what is personal service of a writ, see Sinclair's D. C. Act, 93 *et seq.* It is submitted in view of Rule 4 of the Ontario Judicature Act and *Pollock* v. *Campbell*, 1 Ex. Div. 50, that in the case of partners, service of the attachment on one would not be sufficient service of all. By the Statute of 29 Charles II., chap. 7, sec. 6, the writ can neither be served nor attachment of any property made on Sunday. The service would simply be *void*: *McIleham* v. *Smith*, 8 T. R. 86; *Regina* v. *Leominster*, 2 B. & S. 391, per Wightman, J., at page 399, and could not be waived by the defendant: *Taylor* v. *Phillips*, 3 East. 155. So if the Sheriff should attach the defendant's goods on Sunday, the Court or Judge would order them to be delivered up: *Atkinson* v. *Jameson*, 5 T. R. 25; *Taylor* v. *Phillips*, *supra*;

Loveridge v. *Plaistow*, 2 H. B. 29; *Percival* v. *Stamp*, 9 Ex. 167; *Egginton's Case*, 2 E. & B. 717; Drake on Attachment, 187), and the Sheriff would be a trespasser: *Wilson* v. *Guttery*, 5 Mod. 95. In the absence of statutory enactment the writ could be served on Sunday: *Matthews* v. *Ansley*, 31 Alabama 20.

(*l*) REASONABLE EFFORTS TO EFFECT SERVICE.

What are reasonable efforts must depend upon the circumstances of each particular case. For a full discussion of this question see Sinclair's D. C. Act, 1880, page 92, note (*h*).

(*m*) WRIT COMING TO DEFENDANT'S KNOWLEDGE.

Should it appear that the duplicate writ came to the defendant's possession, that would amount to personal service although knowledge alone would not be: *Williams* v. *Piggott*, 1 M. & W. 574; *Provincial Ins. Co.* v. *Shaw*, 19 U. C. R. 360; *Sutherland* v. *Dumble*, 14 C. P. 156. If the facts shew that defendant has a knowledge of the writ, a strong ground is made out for granting the order to proceed.

(*n*) AFTER DILIGENT INQUIRY.

What is "diligent inquiry" must be determined by the Judge on the facts which the affidavits present, per Erle, C. J., in *Tomlinson* v. *Goatley*, L. R. 1 C. P. 231. The result of the inquiry must be that no information can be obtained as to the place the defendant has fled to.

(*o*) FURTHER ATTEMPT TO EFFECT SERVICE.

The affidavit may not in the opinion of the Judge, as on the application in the case of *Stephen* v. *Dennie*, 3 U. C. L. J. 69, shew that sufficient inquiry was made for the defendant, "and to discover his whereabouts." The Judge in such a case would "require some further attempt" to

effect service before allowing the plaintiff to proceed. The order might, however, be made so that on the further attempt to serve in such way as the Judge should direct being made, the plaintiff could forthwith proceed without a further order. Should special bail be put in an order would be unnecessary.

(*p*) WHAT SHALL BE DEEMED GOOD SERVICE.

When the plaintiff has done all that the Act and the Judge's order (if any) require, then he may apply for an order to proceed. It is submitted that a Judge should rarely grant an order for a writ of attachment to issue and the plaintiff to proceed at the same time; that the granting of the order to proceed can in most cases only be properly made after the Judge has passed upon the efforts, which may have been made to effect personal service or to ascertain where defendant has absconded to, and that to grant an order before such facts were laid before a Judge would in many cases be a dangerous exercise by him of judicial functions. The following cases shew what was deemed good service: In *Kekendall* v. *McKrimmon*, 2 U. C. L. J. 18, Burns, J., allowed the plaintiff to proceed by filing the declaration and notice to plead in the Deputy Clerk's office from which the writ issued. In *Clark* v. *McIntosh*, 2 U. C. L. J. 231, the same learned Judge ordered that the service of the writ and subsequent papers might be effected by leaving them at the defendant's last place of abode. Hagarty, J., in *Kerr* v. *Wilson*, 3 U. C. L. J. 13, followed the order made in *Kekendall* v. *McKrimmon*, 2 U. C. L. J. 184. In *McDougall* v. *Gilchrist*, 3 U. C. L. J. 28, the plaintiff was allowed to proceed by serving the defendant's wife. The plaintiff was allowed by McLean, J., to proceed in *Ross* v. *Cook*, 3 U. C. L. J. 48, by serving the writ on a son of the defendant who had been at one time his partner in business and resided at the defendant's last place of residence in

this country. This case was followed by the same learned Judge in *Buchanan* v. *Ferris*, 3 U. C. L. J. 48. These last two cases, it will be observed, had been commenced under the Act in force before the C. L. P. Act of 1856. The case of *Stephen* v. *Dennie*, 3 U. C. L. J. 69, is the most generally observed as pointing out what should be shewn in all these cases where applications are made for orders to proceed and to the form of affidavit in which case, the reader is referred to the report of that case.

Burns, J., granted an order in *Lyman* v. *Smith*, 3 U. C. L. J. 107, allowing the mailing of the writ to Lewiston, in the State of New York, upon the affidavit of the plaintiff's attorney that after diligent inquiry he was informed that defendant was residing there, to be deemed good service. In *Kerr* v. *Smith*, 3 U. C. L. J. 108, Burns, J., granted an order that the plaintiffs be allowed to proceed by filing declaration and subsequent papers in the office of the Deputy Clerk of the Crown in the County in which the defendants had carried on business, and by serving such papers by leaving them at the last place of abode of the defendants in the Province. Where an order for substituted service has been made and service effected under it, it has the same effect as personal service: *Watt* v. *Barnett*, 3 Q. B. D. 363. In that case Cotton, L.J., says, at page 367: "I agree with the Master of the Rolls that substituted service duly effected must be regarded in the same light as personal service."

(*q*) JUDGE MAY AUTHORIZE.

Where the plaintiff has done everything that the law requires, the Judge (if he has not originally done so) is to grant an order allowing him to proceed with the action. Should there be no seizure of any property under the attachment, nor anything to seize when it was issued, it is submitted that a Judge would not have power to permit a

plaintiff to proceed to judgment. In *Offay* v. *Offay*, 26 U. C. R. at page 364, Draper, C. J., says, "It is to be assumed that the Sheriff found effects which he seized, otherwise the action could not, as I apprehend, have gone on." The plaintiff could not obtain an advantage by improperly issuing an attachment where there was no property to seize which he could not obtain by proceeding in the ordinary way.

The Judge may, in granting leave to proceed, impose the condition that another creditor may appear at the trial and contest the amount of the plaintiff's claim, per Wilson, J., in *Lavis* v. *Baker*, 13 C. P. at page 512. That learned Judge says, "But I think there can be no doubt that under the 8th section of this Act, and even under the common law powers of the Court, the Court may, in granting leave to the plaintiff to proceed, grant it to him subject to such conditions as may be just and reasonable; and it would not be unjust to subject the plaintiff to have his claim contested or reduced by another attaching creditor in like manner as it could have been under the 5th sec. of the repealed Act, 5 Wm. IV., chap. 5."

Plaintiff must prove his claim, &c.

9. Before the plaintiff obtains judgment he shall prove (*r*) the amount of the debt or damages claimed by him in such action, either before a jury on an assessment, or by reference as provided in "*The Common Law Procedure Act*," (*s*) according to the nature of the case, and no execution shall issue until the plaintiff, his attorney or agent, has made and filed an affidavit (*t*) of the sum justly due to the plaintiff by the absconding debtor, after giving him credit for all payments (*u*) and claims which might be set off or lawfully claimed by the debtor at the time of making such last mentioned affidavit, and the execution shall be endorsed to levy the sum so sworn to (*v*) with the taxed costs of suit, or the amount of the judgment including the costs, whichever is the smaller sum of the two. C. S. U. C. c. 25, s. 9.

Rev. Stat. c. 50.

see page 177 for form

(*r*) DEBT TO BE PROVED.

The object of this provision is to compel the plaintiff to prove that he is entitled to recover *the amount* of his claim notwithstanding the absence of the defendant, or of any dispute by him of the correctness of the claim. The defendant cannot plead to the action until after he has put in

special bail: *Offay* v. *Offay*, 26 U. C. R. 363; but he can be heard at the trial in mitigation of damages. At page 367 of the report of that case, the present Chief Justice of the Queen's Bench Division of the High Court, says: "I agree in holding that an absconding debtor, unless and until he shall have put in special bail, cannot be allowed to plead to the action. I am not, however, prepared to hold that he may not be allowed to be heard at the trial in mitigation of damages in the same manner as a defendant after a judgment by *nil dicit*. To place him in any worse position would be to consider him as under some personal disability as under an outlawry. I do not read the statute as creating such a disability, and I think we should not, unless forced by positive and unequivocal words, so construe the Act. A debtor who has absconded may return to the country, intending to remain and wishing to make the best terms with his creditors; he may be wholly unable to put in special bail; yet it seems unreasonable to deprive him of the common privilege of every debtor who has allowed judgment to go by default without express legislative authority. I think the statute so far from putting him under any express disability supposes the contrary." From the principle of this case, it would appear to be law that all the plaintiff would require to prove, would be *the amount* of his debt, a liability would be admitted. The right to interest would have to be proved in the ordinary way. See the next note to this section.

(*s*) HOW DAMAGES ASCERTAINED.

Two courses are open to a plaintiff, one to take a verdict at a sittings of the Court, the other by reference under the 197th section of the Common Law Procedure Act: See Har. C. L. P. Act, 215; *Chapman* v. *DeLorme*, 5 U. C. L. J. 138. The latter is the course usually adopted, being more expeditious and inexpensive. In either case it is submitted the

plaintiff should first sign interlocutory judgment: Arch. Pract. 12 Ed. 994, and cases there cited: Lush's Practice, 3rd Ed. 791 *et seq*; Har. C. L. P. Act, 216. At page 792 of his work, Mr. Lush lays down the practice as follows: "These proceedings presuppose that a judgment has been given, and hence if a writ of inquiry be sued out, or a reference to the Master be obtained before judgment has been signed, the proceedings will be irregular. But it is now settled that the plaintiff is not bound to wait till the following day, but may sue out the writ, or obtain the reference immediately after judgment has been given; and as the Courts will not inquire which of two acts, which may immediately follow one upon the other, was in fact done first, there will be no irregularity in issuing the writ, etc., first, if it be on the same day that judgment is signed." At page 794, the same learned writer says: "Although the plaintiff has in strictness of law a right to have them, (the damages) determined by a jury in all cases, yet he would not be allowed the costs of the inquiry where they might have been, or at all events where, by the course of practice, it has become usual to have them assessed by the Master."

An appeal lies against a finding under the 197th sec. of the C. L. P. Act; see sub-sec. 2 of that section. Under the statute of 2 Wm. IV. chap. 5, sec. 7, the plaintiff was obliged "to prove his cause of action in the same manner as if the general issue had been pleaded," and the courts strictly exacted it; see *Sifton* v. *Anderson*, 5 U. C. R. 305; but the present Act makes no such requirement; the *amount* of damages being the sole inquiry.

(*t*) AFFIDAVIT TO BE MADE.

The clerk of the court should see that this affidavit is made and filed before execution issues. It is difficult to say whether "agent" here means a legal agent or not. It is

submitted that it does not, but must be taken in its general sense. The words "justly due" should be used; see *Meyers* v. *Campbell*, 1 Cham., R. 31; *Jackson* v. *Kassel*, 26 U. C. R. 341. A form of affidavit will be found in the appendix.

(*u*) CREDIT FOR ALL PAYMENTS.

The object of the legislature here is to protect the absconding debtor, if possible, against the recovery by the plaintiff of more than he is justly entitled to. All "payments" made at any time before the making of the affidavit, are to be duly credited, and all "claims" which might be set off, or lawfully claimed by the debtor, at the time of making such last mentioned affidavit are also to be allowed. The last alternative is intended to cover any set-off which the debtor might have against the plaintiff, or any other claim, which could have been set up in reduction of the plaintiff's claim, or which in law should otherwise be allowed the debtor. As to the proper method of calculating interest where payments extend over a length of time; see *McGregor* v. *Gaulin*, 4 U. C. R. 378; *Barnum* v. *Turnbull*, 13 U. C. R. 277; *Bettes* v. *Farewell*, 15 C. P. 450; *Ross* v. *Perrault*, 13 Grant 206; Sinclair's D. C. Act, 135. Where a claim is payable otherwise than by written contract, interest may be allowed from the date of a demand in writing; but on a claim for extra work and materials furnished by the plaintiff, but not under a written contract, and no demand proved interest was disallowed: *Inglis* v. *The Wellington Hotel Co.*, 29 C. P. 387. The plaintiff would have to prove his right to interest, as in an ordinary defended action; see Lush's Practice, 3rd Ed. 794. As to when interest is recoverable; see Sinclair's D. C. Act 135, *et seq.* *In re Roberts, Goodchap* v. *Roberts*, 14 Chan. Div. 49; *Hill* v. *South Staffordshire Ry. Co.*, L. R. 18 Eq. 154; *St. John* v. *Rykert*, 4 App. R. 213; *Popple* v. *Sylvester*, 47 L. T., N. S. 329; Law Reports' Digest (1882), 1983.

(*v*) EXECUTION TO ISSUE FOR SUM SWORN TO.

Should execution be maliciously issued for more than is due it would be actionable: *Churchill* v. *Siggers*, 3 E. & B. 929; but if consistent with the judgment, so long as that stood, no action would be maintainable: *Huffer* v. *Allen*, L. R. 2, Ex. 15. Should judgment be entered for more than the sum found to be due, the proper course would be to make application to amend the judgment-roll and writ of execution to the proper sum.

BAIL.

Court may allow defendant to put in special bail.

10. The Court or a Judge at any time before or after final judgment, but before execution executed (*w*), upon an application supported by satisfactory affidavits (*x*), accounting for the defendant's delay and default and disclosing a good defence on the merits (*y*), may, having regard to the time of the application and other circumstances, let in the defendant (*z*) to put in special bail and to defend the action, or may reject the application. C. S. U. C. c. 25, s. 11.

(*w*) WHEN APPLICATION TO BE MADE.

This application can be made any time before execution is executed. It certainly would be too late after the return of the writ by the Sheriff, "money made," and whether the money was actually paid over by the Sheriff or not could make no difference: Watson on Sheriff, 272, 273, 295; *Bennett* v. *Bayes*, 5 H. & N. 391; Arch. Pract. 12th Ed. 681.

(*x*) ON SATISFACTORY AFFIDAVITS.

The affidavits must be such as satisfy the Court or Judge on the question of the defendant's delay and default and must *disclose* a good defence on the merits. As to a waiver of legal rights by delay, see R. & J.'s Digest, 1931 *et seq.*; Arch. Pract. 12th Ed. 988; Har. C. L. P. Act, 64. The

latest case has now laid down the law that where no irreparable wrong will be done a plaintiff, who has obtained judgment by default, lapse of time is not a bar to the application to set it aside: *Atwood* v. *Chichester*, 3 Q. B. D. 722, and probably the same rule would apply here.

(*y*) DEFENCE ON THE MERITS.

The language here employed and that used in the 64th section of the Common Law Procedure Act is substantially the same, and the decisions under that section or the one in the English Act from which it is taken must apply here. The ordinary affidavit of merits would not be sufficient. The merits must be *disclosed: Whiley* v. *Whiley*, 4 C. B. N. S. 653; *Anderton* v. *Johnston*, 8 U. C. L. J. 46; *McDonald* v. *Burton*, 2 L. J. N. S. 190; *The Wooster Coal Co.* v. *Nelson*, 4 P. R. 343; *Smith* v. *Dobbin*, 37 L. T. N. S. 388,777; *Proudfoot* v. *Harley*, 11 C. P. 389; *Bank U. C.* v. *Vidal*, 15 C. P. 421. Any defence legal or equitable would be within the section: see *In re Cowans' Estate*, 14 Chan. Div. 638; *Leaming* v. *Woon*, 7 App. R. 42. The defendant "need not state the whole defence with minute particularity," per Cockburn, C.J., at page 659 of 4 C. B. N. S.; *Bouchier* v. *Patton*, 3 U. C. L. J. 48; Sinclair's D. C. Act, 101 *et seq.*; *Moore* v. *Hicks*, 6 U. C. R. 27.

(*z*) LET IN THE DEFENDANT.

If the defendant makes out a case under this section the Court or Judge will grant him leave to put in special bail. He cannot defend the action without first putting in bail: *Offay* v. *Offay*, 26 U. C. R. 363. If the application is rejected the defendant may, on the authority of the last case, still question the amount of damages which the plaintiff claims.

11. The special bail (*a*) (whether put in within the time limited by the writ or within such time as the Court or a Judge directs,) shall be put in and perfected in like manner as if the defendant had been arrested on a writ of *capias* for the amount sworn to on obtaining the attachment; and after being so put in and perfected, the defendant shall be let in to plead, and the action shall proceed as in ordinary cases begun by writ of *capias*. C. S. U. C. c. 25, s. 12.

Defendant's property to be restored on his putting in special bail.

(*a*) SPECIAL BAIL.

By section 39 of the C. L. P. Act, it is declared that, "Special bail may be put in and perfected according to the established practice." This practice the writer will attempt shortly to explain in the notes to this and the next following section. The 40th section of the C. L. P. Act enacts, that the condition of the recognizance of special bail shall be, "that if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render himself to the custody of the Sheriff of the County in which the action against such defendant has been brought, or that the cognizors will do so for him." By the section under consideration, the special bail shall be put in and perfected in like manner as if the defendant had been arrested on a writ of *capias* for

the amount sworn to on obtaining the attachment. The practice as to putting in special bail for a defendant arrested on a *capias* must therefore be referred to, and adopted in regard to putting in bail in cases of attachment. The bail must consist of *two* persons, one bail not being deemed sufficient: Arch. Pract., 12th Ed. 830; Lush's Pract., 3rd Ed. 714. By Rule 75 of the General Rules of Practice: Har. C. L. P. Act, 662; which, in so far as the putting in of special bail is concerned, these rules are unaffected by the Judicature Act; it is declared that notice of more bail than two shall be deemed irregular unless by the order of the Court or a Judge. After the bail has been put in and perfected, the defendant shall be let in to plead, and the action shall proceed as in ordinary cases begun by writ of *capias*. As to the procedure in actions against absconding debtors after the defendant has been let in to plead under this section, see Rule 4 of the Judicature Act.

12. Upon the defendant so putting in and perfecting special bail (*b*), all his property, credits and effects attached in that suit, (excepting any which may have been disposed of as perishable, and then the net proceeds of the goods so disposed of,) shall be restored (*c*) and paid to him unless there be some other lawful ground for the Sheriff to withhold or detain the same. C. S. U. C. c. 25, s. 13. Or proceeds if sold.

(*b*) WHEN BAIL MUST BE PUT IN.

Special bail must be put in within the time mentioned in the writ of attachment. The Judge's order makes provision in that respect under section 2. If proceedings have been stayed or further time granted, then the defendant has, until the expiry thereof, to put in bail: Lush's Pract., 3rd Ed. 713.

WHO MAY BE BAIL.

A practising solicitor cannot be bail: General Rules, No. 79; Har. C. L. P. Act, 663; nor by Rule 77, can any person justify as bail, if such person has been indemnified for so doing by the attorney or solicitor for the defendant. Nor can a turnkey or keeper of a county gaol, or a person employed by the Sheriff: Har. C. L. P. Act, 663; Lush's Pract., 3rd Ed. 715; Arch. Pract. 12th Ed. 829, *et seq.* The bail must be "freeholders" or "housekeepers": Rule 81. If the latter, the house must be within the jurisdiction of

the Court: *Hughes* v. *Stirling*, 11 P. R. 158 (English); Lush's Pract., 3rd Ed. 716.

NUMBER OF BAIL.

By Rule 75, it is declared that, "notice of more bail than two, shall be deemed irregular unless by order of the Court or of a Judge": Har. C. L. P. Act, 662; see also Lush's Pract., 3rd Ed. 714; Arch. Pract., 12th Ed. 830.

BEFORE WHOM BAIL PUT IN.

Bail can be put in before the Court or a Judge or a Commissioner appointed to take bail under Rev. Stat., chap. 80. By the same statute, Judges and Clerks of County Courts can take all recognizances of bail in their respective Courts. See also Arch. Pract., 12th Ed. 833; Lush's Pract., 3rd Ed. 718; Har. C. L. P. Act, 36.

RECOGNIZANCE OF BAIL.

Care must be taken in drawing up the recognizance. It must state correctly the day of the month and the County in which bail is put in. The names of the parties should also be correctly stated, also the sum sworn to. The bail-piece may be amended with the consent of the bail: Arch. Pract., 12th Ed. 834-835; *Daniell* v. *James*, 2 P. R. 195; Lush's Pract., 3rd Ed. 720. For form of recognizance see appendix.

AFFIDAVIT OF JUSTIFICATION.

By the 81st General Rule of Practice: Har. C. L. P. Act, 664; it is declared that, "if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the

Court or a Judge thereof shall otherwise order." The form of affidavit will be found in the appendix. As to the requirements of this affidavit, see Arch. Pract., 12th Ed. 837, *et seq.*; Lush's Pract., 3rd Ed. 722, *et seq.*; Har. C. L. P. Act, 664, *et seq.* The affidavit must shew, that *each* person justifying is worth double the amount sworn to by the plaintiff, his attorney, or agent, on issuing the attachment, over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds one thousand pounds, when it shall be sufficient for the bail to justify in one thousand pounds beyond the sum sworn to: Rule 84; Har. C. L. P. Act, 667. Although the form does not give it, the addition and true place of abode of each of the bail must be stated: Treasure's Bail, 2 Dowl. 670; Brown's Bail, 5 Dowl. 220. A defect in the affidavit of justification does not prevent the bail from justifying, it only deprives the defendant of the costs: *Brown* v. *Ahrenfeldt*, 4 M. & W. 76; *Warren* v. *De Burgh*, 7 Dowl. 96; Lush's Pract., 3rd Ed. 724.

AFFIDAVIT OF DUE TAKING OF BAIL.

By section 2 of chapter 80 of the Revised Statutes, an affidavit of due taking of the recognizance of bail by some credible person is required. Every person *compos mentis* and of sufficient age is now "credible." When a Judge of a Superior Court takes bail, this affidavit is not required: Rev. Stat. chap. 80, sec. 4. It cannot be made by the Commissioner who takes bail: *Wallbridge* v. *Lunt*, Tay. 638. For form of affidavit see appendix.

RECOGNIZANCE AND AFFIDAVITS TO BE FILED.

The recognizance of bail and the affidavits of justification and due taking thereof, are to be filed in the office of the Clerk or Deputy-Clerk of the Crown (or Clerk of the County

Court, as the case may be) in the County in which the recognizance of bail was taken: Rev. Stat., chap. 80, sec. 2; but if the recognizance is taken in a County other than that from which the writ issues, then the filing should be in the office from which the writ issues: *Hubbard* v. *Milne*, 1 L. J. N. S. 14. By section 3, when these are taken and filed: *Lee* v. *Morrow*, 25 U. C. R. 604; the recognizance shall be of the like effect and subject to exception as to the bail, in like manner, and within the same time as if taken in open Court.

NOTICE OF BAIL.

If the notice of bail is accompanied by the affidavit of justification required by Rule 81: Har. C. L. P. Act, 664; and the plaintiff does not except to the bail by giving one day's notice of exception, under Rule 82: Arch. Pract., 12th Ed. 840; "The recognizance of such bail may be taken out of Court without other justification than such affidavit": *Ib.* If the plaintiff excepts to the bail and they are allowed, he must pay the costs of justification: Rule 81; Har. C. L. P. Act, 664. To annex a *copy* of the affidavit of justification, and marked "copy," would be sufficient, or the notice must state it to be a copy, and it must purport to be a copy of the affidavit so filed: *West* v. *Williams*, 3 B. & Ad. 345; Lush's Pract., 724. In the last named work, and at the same page, it is said, "The rule, though in terms it seems to direct that the affidavits themselves should be delivered with the notice, will be satisfied with the delivery of a copy."

By Rule 85, it is declared to be "sufficient in all cases if notice of justification of bail be given two days before the time of justification." When the notice of bail is not accompanied by a copy of the affidavit of justification, see Rule 83; Har. C. L. P. Act. 666; Arch. Pract., 12th Ed. 840, *et seq.*

As our statute requires an affidavit of due taking to be

made and filed, perhaps it would be better to serve a copy of that also with the notice of bail. For form of notice see appendix: Lush's Pract., 3rd Ed. 727. The notice must state the names of the bail, their residence and addition correctly. Where the notice has been held insufficient, see Lush's Pract., 3rd Ed. 726; Arch. Pract., 12th Ed. 835, *et seq.*

EXCEPTING TO BAIL.

The writer cannot find the trace of any practice in this Province different from that observed in England in respect to the excepting to bail. In Lush's Practice, 3rd Ed. 728, it is thus laid down. "The exception is made by entering in a book kept for the purpose at the office where the bail-piece is filed, or in the case of country bail, on the back of the bail-piece, the words, 'I except against these bail: ——, ———, plaintiff's attorney;' and by giving a written notice thereof to the defendant's attorney or agent as the case may be. The notice is in this form being entitled in the Court and cause:

"Take notice that I have excepted against the bail put in in this cause for the defendant, dated, etc." and signed by the plaintiff's solicitor. It is further laid down in Lush at page 729, that "if either the entry or the notice be omitted, the exception will be incomplete, even as it would seem, against the defendant, although both may be waived as against him, by his giving a notice of justification." On exception being made to the bail by the plaintiff, the defendant's solicitor is bound to give two day's notice in writing to the plaintiff's solicitor, under Rule 85: Har. C.L.P. Act 667; of his intention to justify, mentioning time and place. In the Superior Courts the notice should be for justification at Judges' Chambers in Toronto and in the County Court before the Judge of that Court. It is very doubtful if Local Judges of the High Court could act. A form of notice will

be found in the appendix. The bail-piece should be brought before the Judge with an affidavit of service of notice of justification, and notice of bail, and of a copy of the affidavit of justification. Unless the plaintiff can establish the insufficiency of either of the bail, they will be allowed: Lush's Pract. 3rd Ed. 730, *et seq.* The Court or Judge will grant an order of allowance, when the bail will be considered as *perfected* within the meaning of this section. If no exception be made to the bail, the same will be perfected after the time has expired for giving notice of exception. See Rule 82: Har. C. L. P. Act 666; Arch. Pract. 12 Ed. 840. If the bail do not justify by affidavit, they will have to appear before the Court or Judge and justify.

CHANGING BAIL.

"The bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge." Rule 76, Har. C. L. P. Act 662; Arch. Pract. 12th Ed. 843; Lush's Pract. 3rd Ed. 734.

LIABILITY OF BAIL.

"Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance." Rule 89, Har. C. L. P. Act 668.

(*c*) GOODS TO BE RESTORED TO DEFENDANT.

The provision in regard to Special Bail is for the benefit of the defendant, and one object in putting it in, is for the purpose of getting back his property. He may also have a good defence to the action, and with a view of establishing it in the only manner possible: *Offay* v. *Offay*, 26 U. C. R. 363; the defendant may choose to put in bail. If any of the goods have been disposed of as perishable by the Sheriff, which under certain circumstances he is allowed to

do by sec. 14, then only the net proceeds of such goods are to be restored to the defendant. It will be observed that the words, "net proceeds" have only reference to the goods disposed of, so that the Sheriff would not have any right to deduct anything for his costs and expenses, except in respect of the perishable property which had been disposed of by him. The balance of the net proceeds of sale he would have to pay over to the defendant. The same difficulty may arise as to the respective rights of the Sheriff and the defendant in regard to the restoration of the property. Is it the duty of the Sheriff to take back the goods from whence he got them, or the duty of the defendant to go to the Sheriff for the goods? The writer has been unable to find any expression of judicial opinion upon the point, but from the ordinary etymological meaning given to the word, "restored" and in view of *Rapelje* v. *Finch*, 14 U. C. R. 468, he thinks the former is the correct view of it. As the plaintiff must, under section 17, advance all Sheriff's expenses; the costs of the delivery of the goods back to the defendant would be deductable from the sum so advanced, and would form part of the Sheriff's costs in the suit.

Unless other good cause of detainer; there being no writ of attachment or writ of execution or any other process authorizing the seizure or attachment of the goods, it would be the duty of the Sheriff not to refuse a restoration of them to the defendant. It might, however, be that some of the property attached should be restored and other portions of it not; for instance, all book debts would be the subject of attachment, but not seizable under an execution against goods. Yet, on special bail being put in, the defendant would, as against a writ of *fieri facias* against goods, have a right to deal with such book debts as his own; yet, in regard to ordinary chattels, such execution in a Sheriff's hands would be no bar to the restoration of such book debts

to the defendant. Should other writs be in the Sheriff's hands, it will be for him to consider what particular part, if not the whole, of the defendant's property is subject to such writs, and then to restore only such of it as the defendant is entitled to. If real property has been taken possession of, under attachment which it is the Sheriff's duty to do: *Doe d. Crew* v. *Clarke*, M. T. 4 Vict.; he should, on special bail being perfected, deliver up possession of it to the defendant. Should the Sheriff omit, neglect or refuse to restore the property, he would be liable to the defendant in an action therefor, and also be subject to the summary jurisdiction of the Court as one of its officers.

WHAT PROPERTY MAY BE ATTACHED.—INVENTORY, ETC.

Sheriff to attach all the property and credits of defendant.

13. All the property, credits and effects of an absconding debtor, including all rights and shares in any association or corporation, may be attached (*d*) in the same manner as they might be seized in execution; and the Sheriff to whom any writ of attachment is directed shall forthwith take into his charge or keeping all such property and effects (*e*) according to the exigency of the writ, and shall be allowed all necessary disbursements for keeping the same, and he shall immediately call to his assistance two substantial freeholders of his County, and with their aid he shall make a just and true inventory (*f*) of all the personal property, credits and effects, evidence of title or debt, books of account, vouchers and papers that he has attached, and shall return such inventory signed by himself and the said freeholders, together with the writ of attachment. C. S. U. C. c. 25, s. 14.

Inventory to be made.

(*d*) SHERIFF'S DUTIES AND LIABILITIES.

The first duty of a Sheriff who is called on to execute a writ of attachment placed in his hands to be executed, is to ascertain that it was issued by an officer having legal power to issue it. If issued by one having no such power, it is absolutely void, and will afford no protection whatever to him who acts under it: *Morrison* v. *Lovejoy*, 6 Minnesota, 183; Drake on Attachment, 184, *et seq.* The same result would follow if issued from a Court of limited jurisdiction for an amount clearly beyond the jurisdiction of such Court. But if the writ is in legal form, and issued out of a Court and by an officer having competent jurisdiction, the Sheriff, or any one acting under his authority, is protected: *Fulton* v. *Heaton*, 1 Barbour, 552; and with the liability of the defendant, or such questions, he has no concern: *Livingston* v. *Smith*, 5 Peters, 90. If a person is deputed to execute the writ, he has all the powers of the Sheriff who deputed him, but, if required, should make known his authority: *Burton* v. *Wilkinson*, 18 Vermont, 186; and this should be by warrant in writing: Lush's Pract., 3rd Ed. 588. The authority of the Sheriff continues until the return day of the writ, or until he has actually returned it, if returned before that day; *Courtney* v. *Carr*, 6 Iowa, 238. A levy made after the return day, without a renewal of the writ, would be of no avail: *Dame* v. *Fales*, 3 New Hamp. 70; *Peters* v. *Conway*, 4 Bush, 566. The duty of the Sheriff, on receiving a writ of attachment, is to levy on any property of the defendant he can find. He has no discretion, but must take the property into the custody of the law, and a bond to indemnify the Sheriff against doing his duty, has, on the grounds of public policy, been held void: *Cole* v. *Parker*, 7 Iowa, 167; *Denson* v. *Sledge*, 2 Devereux, 136. In some of the American States, the Sheriff is not bound to execute the writ without

a bond of indemnity where, in its execution, there is danger of committing a trespass: Drake on Attachment, sec. 189; but under our law it is submitted that he must do his duty, even at peril of an action. The Sheriff must attach sufficient property, if it can be found, to secure the amount of the plaintiff's claim, as stated in the writ; and failing this, he would be liable for any deficiency: *Fitzgerald* v. *Blake*, 42 Barbour, 513; and the same rule applies where there are more writs than one: *Ransom* v. *Halcott*, 18 Barbour, 56. The Sheriff is obliged to execute the attachment "forthwith"; as to the legal meaning of which, see this and subsequent notes to this section, and *Ex parte Lamb*, *In re Southam*, 19 Chan. Div. 169; Sinclair's D. C. Act, 1880, 24. If damage ensued through his delay, he would be responsible to the plaintiff: *Kennedy* v. *Brent*, 6 Cranch, 187. Although the statute requires a strict and sharp performance of duty by the Sheriff, the law does not require impossibilities of him, nor does it impose unconscionable exactions: Drake on Attachment, sec. 191. An attachment of property effected by unlawful or fraudulent means, is illegal and void: Drake, sec. 193. In executing the writ, the officer should act in conformity with the law under which he proceeds; for, if he does not, no lien would be created on the property; *Gardner* v. *Hust*, 2 Richardson, 601. For instance, if he attached goods on Sunday, his act would be void; so would it also be if he abused the process of the Court, and committed a wrongful act under its assumed authority: *Barrett* v. *White*, 3 New Hamp. 210; *Sneary* v. *Abdy*, 1 Ex. D. 299. A Sheriff, executing the writ in a lawful manner, can never be a trespasser: *Wakefield* v. *Fairman*, 41 Vermont, 339. Should the Sheriff levy on property not liable to attachment (which would be a rare occurrence under the comprehensive words of our statute), he would be a trespasser: *Cooper* v. *Newman*, 45 New Hamp. 339. So also if the property belonged to a stranger: *Woodbury*

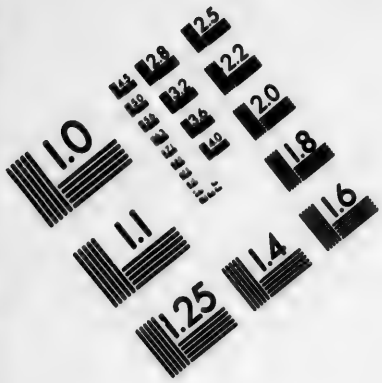
v. *Long*, 8 Pick. 543, and for which his sureties would be liable: *People* v. *Schuyler*, 4 Comstock, 173; *Harris* v. *Hanson*, 11 Maine, 241. Sometimes there is a confusion of goods, such as corn, hay, saw-logs, or the like property; but where the articles are readily distinguishable from each other, there is no confusion, as in the case of cattle: *Holbrook* v. *Hyde*, 1 Vermont, 286; or of crockery ware and china placed on the same shelf: *Treat* v. *Barber*, 7 Conn. 274. If it happen that the goods of a stranger are intermixed with those of the defendant, even without the owner's knowledge, the owner can maintain no action against the Sheriff for taking them until he has notified the officer and demanded and identified his goods, and the Sheriff shall have delayed or refused to deliver them: *Tufts* v. *McClintock*, 28 Maine, 424; *Wilson* v. *Lane*, 33 New Hamp. 466. In such case, the officer cannot be treated as a trespasser for *taking* the goods; but if he should sell the whole, under section 14, after notice of the owner's claim, he would be liable for a conversion: *Lewis* v. *Whittemore*, 5 New Hamp. 364; *Albee* v. *Webster*, 16 New Hamp. 362; *Wallace* v. *Swift*, 31 U. C. R. 523. If a person wilfully intermingle his goods with those of another, so that they cannot be distinguished, the other party is, by the principles of the common law entitled to the entire property, without liability to account for any part of it: *Smith* v. *Sanborn*, 6 Gray, 134. In that case the Sheriff cannot attach any of the goods for a debt of him who caused the intermixture: *Beach* v. *Schmultz*, 20 Illinois, 185; but may attach the whole for the debt of the innocent party; and if the former would reclaim his property by law, the burden of proof is on himself to distinguish his goods from those of the defendant: Drake on Attachment, 199. To justify the attachment of goods of a stranger, on the ground of intermixture, it is incumbent on the officer to show that the goods were of such a character, or, at least, that there was such an

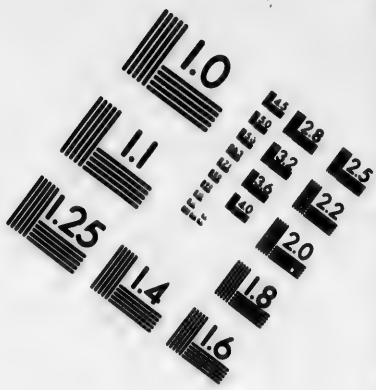
intermixture that they could not, upon due enquiry, be distinguished from those of the defendant: *Walcott* v. *Keith*, 2 Foster, 196; *Wilson* v. *Lane*, 33 New Hamp. 466; *Morrill* v. *Keyes*, 14 Allen, 222. The Sheriff may enter the store of a third person where goods of the defendant are for the purpose of executing the writ, and may even break open the door, if refused admittance on request, and may remain there long enough to seize, secure and make an inventory of the goods; and if the owner of the store resist or oppose him, he may use whatever force is necessary to enable him to perform his duty: *Fullerton* v. *Mack*, 2 Aikens, 415; *Platt* v. *Brown*, 16 Pick. 553; *Perry* v. *Carr*, 42 Vermont, 50; but in such case he is not entitled, without the consent of the proprietor, to make use of the tenement to keep the attached property in: *Rowley* v. *Rice*, 11 Metcalf, 337; but must remove it as soon as possible: *Williams* v. *Powell*, 101 Mass. 467. The Sheriff could not break open the outer door of a *dwelling-house* to execute an attachment: Watson on Sheriff, 75; Lush's Practice, 3rd Ed. 590; *Ilsley* v. *Nichols*, 12 Pick. 270; *People* v. *Hubbard*, 24 Wendell, 369; *Swain* v. *Mizner*, 8 Gray, 182; but having gained admission to the house lawfully, he may break inner doors to seize the goods: Lush's Pract., 590; Fisher's Digest, 7824. If the Sheriff should abandon the property attached, all previous rights acquired are gone: *French* v. *Stanley*, 21 Maine, 512. The Sheriff should not use the property attached: Drake on Attachment, sec. 203. He should be careful in making his return, for he is bound by it: *Haynes* v. *Small*, 22 Maine, 14; *Field* v. *Smith*, 2 M & W. 388. The return should fully and specifically shew what the Sheriff has done under the writ: Drake on Attachment, sec. 205, *et seq.* The articles attached should be described in the inventory, so that their identity could readily be ascertained: Drake, sec. 208. The return by the Sheriff will be accepted in evidence as *prima facie*

correct: Drake, sec. 210; but only if made in proper time: *Williams* v. *Babbett*, 14 Gray, 141. The Court or Judge will, on proper grounds being shewn, allow the Sheriff to amend his return: Drake, sec. 212; but he cannot do so without leave: *Miller* v. *Shackleford*, 4 Dana, 264; Watson on Sheriff, 92-94; Drake, sec. 216, *et seq.* In general, no amendment of a Sheriff's return will be allowed when it would prejudice the rights of third persons previously acquired *bona fide* and without notice: Drake, secs. 219-220.

The Sheriff is "*forthwith*" to take charge of the property attached. The words "forthwith" and "immediately" have the same meaning and imply prompt, vigorous action without any delay: per Cockburn, C. J., in *R.* v. *Berkshire Justices* 4, Q. B. D. 469; *Ex parte Lamb, In re Southam*, 19 Ch. D. 169. The necessity for immediate action will appear when it is considered, that until seizure no lien is created. *Kingsmill* v. *Warrener*, 13 U. C. R. 18; *Potter* v. *Carroll*, 9 C. P. 442. Drake on Attachment, sec. 221. See also *Howell* v. *McFarlane*, 16 U. C. R. 469. The Sheriff is not responsible for not seizing goods, the presence of which he has no notice, though he uses all due diligence: *Yourrell* v. *Proby*, 2 Irish C. L. R. 460. If a claim should be made to goods attached, there could be an interpleader issue directed at the instance of the Sheriff, between the claimant and the attaching creditor, and the frame of it should be, whether the goods taken under the attachment were at the time of the seizure the property of the claimant, as against the attaching creditor, *and not as against the absconding debtor: Doyle* v. *Lasher*, 16 C. P. 263. It was decided in the same case and supported by *Snarr* v. *Smith*, 45 U. C. R. 156, that whatever transfers of property by the absconding debtor the Sheriff could impeach, so also might the attaching creditor. Where notes are not actually seized on attachment against their holder, it was held that on his return to this Province, he could sue on them: *Slattery* v. *Turney*, 7 U. C. R. 578.

If the Sheriff does not seize the property, the owner may sell it and the property passes: per Richards, J., in *Taylor* v. *Brown*, 17 C. P. 392; Drake on Attachment, sec. 222. The first duty of the Sheriff is to take possession of, and *keep*, the property attached. If he waste or lose it, or suffer it to be diverted to some other purpose than satisfying the plaintiff's judgment when obtained, or to go out of his possession, except in due course of law, he is liable for it to the plaintiff, if he obtain judgment and execution in the attachment suit; or to the defendant if that suit fails: *Sanford* v. *Boring*, 12 California 539; *Price* v. *Stokes*, 2 Smith & Tudor's L. C. 4th Ed., 881. By the levy under attachment and the reduction of the property into his possession, the Sheriff is vested with a *special* property in it, which enables him to protect the rights he has acquired: *Braley* v. *French*, 28 Vermont 546; Watson on Sheriff, 272; *Playfair* v. *Musgrove*, 14 M. & W. 239; and this property is an insurable interest which he may protect by insurance, though he is not under any obligation to insure it: *White* v. *Madison*, 26 Howard's Pract. R. (N. Y.) 481; and would not be in the nature of an insurer, as he is after seizure on a writ of execution; *Ross* v. *Grange*, 25 U. C. R. 396. As to the Sheriff's insurable interest in the goods attached, see *Marks* v. *Hamilton*, 7 Ex. 323; *Goulstone* v. *Royal Ins. Co.* 1 F. & F. 276; *Waters* v. *Monarch*, F. & L. Ass. Co. 5 E. & B. 870; *N. B. Ins. Co.* v. *Moffatt*, L. R. 7 Q. B. 25; and he would be a trustee for the attaching creditor or the owners of the goods, to the amount of insurance money recovered: *L. & N. W. R'y Co.* v. *Glyn*, 1 E. & E. 652. See also, *White* v. *Madison*, 26 Howard's Pract. R. (N. Y.) 117; *Cumberland Bone Co.* v. *Andes Ins. Co.*, 64 Maine 466; *Babson* v. *Thomaston Ins. Co.*, 4 Insurance L. J. 50; *Kline* v. *Queen Ins. Co.*, 69 N. Y. 614. Should the attaching creditor request the Sheriff to insure the goods attached, and tender him the amount of premium therefor, it is





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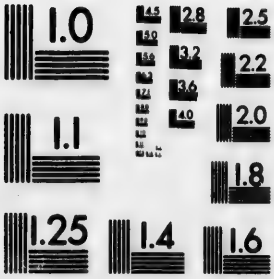

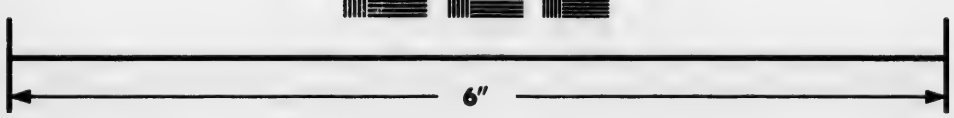

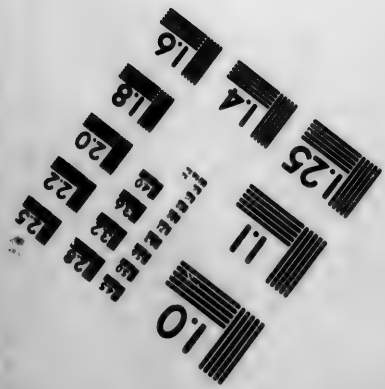

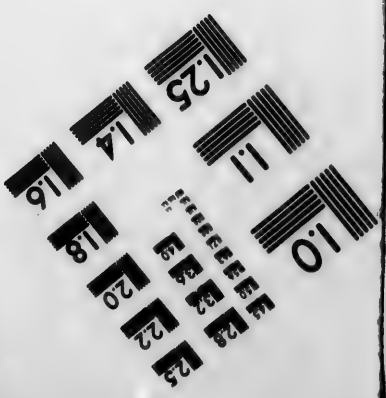

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submitted that in case of his omission or refusal to do so, and if the goods were afterwards destroyed by fire, the Sheriff would be responsible for the loss. Should the Sheriff refuse or omit to insure, it is submitted that the attaching creditor could do so to the extent of his claim: *Rohrbach* v. *Germania F. Ins. Co.*, 62 N. Y. 47; *Harvey* v. *Cherry*, 76 N. Y. 436; *Butler* v. *Standard F. Ins. Co.*, 4 App. R. 391. The special property which the Sheriff acquires in the goods by their attachment, continues so long as he remains liable for them and no longer: *Collins* v. *Smith*, 16 Vermont 9. The Sheriff can, as against a wrongdoer, maintain an action for any trespass to the goods: *Krehl* v. *Great Central Gas Co.*, L. R. 5 Ex. 289, 293; *Ludden* v. *Leavitt*, 9 Mass. 104; *Brownell* v. *Manchester*, 1 Pick. 232; *Perley* v. *Foster*, 9 Mass. 112; Watson on Sheriff, 302, but the attaching creditor could not: *Skinner* v. *Stuart*, 39 Barbour 206; *Schaeffer* v. *Marienthal*, 17 Ohio, 183. If the Sheriff sells the property attached without lawful authority he is considered a trespasser *ab initio*: *Ross* v. *Philbrick*, 39 Maine, 29. See also, *Outwater* v. *Dafoe*, 6 U. C. R. 256; *McPherson* v. *Reynolds*, 6 C. P. 440; *Anderson* v. *McEwan*, 8 C. P. 532.

It is very important for the Sheriff to retain possession of the property either actual or constructive. As already remarked, the Sheriff cannot be considered an insurer of the property attached. He is only liable for the want of that ordinary and common care, diligence and prudence, which a reasonable and careful man in view of all the circumstances of the case is presumed to exercise: Drake on Attachment, sec. 292. If the property attached does not belong to the debtor, the Sheriff can shew that as an excuse for its non-production to meet the plaintiff's judgment and execution: *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; *Nerlich* v. *Malloy*, 4 App. R. 430. So, also, if it is exempt from seizure, or *in custodia legis*, and therefore not

attachable: Drake, sec. 294. If attached property, of which due care is taken by the Sheriff, be lost by fire or theft, he is not liable for the loss; but it is otherwise, if it be burned, or stolen, while he omits due care to prevent such loss: *Dorman* v. *Kane*, 5 Allen, 38; *Starr* v. *Moore*, 3 McLean, 354.

The Sheriff could not protect himself from his obligation to have the property forthcoming on execution by making return that he attached it "*at the risk of the plaintiff:*" *Lovejoy* v. *Hutchins*, 23 Maine, 272; nor could he contest the validity of the judgment in the action in which the property was attached to relieve himself from responsibility for the property: *West* v. *Meserve*, 17 New Hamp. 432.

If attached property is removed out of the Sheriff's bailiwick without his consent, he may pursue and reclaim it anywhere: *Utley* v. *Smith*, 7 Vermont, 154. The expense of keeping attached property is no excuse for its nonproduction: *Tyler* v. *Ulmer*, 12 Mass. 163. Where an officer was instructed by the plaintiff's attorney to deliver attached property to a certain person, and to take his receipt therefor, and he does so, it was held that he could not be held to produce the property on execution: *Rice* v. *Wilkins*, 21 Maine, 558. In an action against a Sheriff for failing to keep attached property, it was held, that he might show in mitigation of damages, that the execution has, since suit brought against him been satisfied, but that the plaintiff was still entitled to nominal damages: *Brown* v. *Richmond*, 27 Vermont, 583. In order to fix the Sheriff's liability, it is said that a demand for the property must first be made: Drake on Attachment, sec. 305. If the attachment is set aside the property must be restored to the defendant, but the Sheriff should have actual notice of it: Drake, sec. 306. In actions against Sheriffs for neglect of duty, the ordinary rule as to damages would prevail, namely, to the extent of

the actual injury sustained: Drake, 309; Mayne on Damages, 3rd Ed., 408, *et seq.*

As to the seizure by a Sheriff of stocks in corporations, see *Brock* v. *Ruttan*, 1 C. P. 218; *Robinson* v. *Grange*, 18 U. C. R. 260; *Goodwin* v. *The Ottawa and Prescott R'y Co.*, 22 U. C. R. 186, and 13, C. P. 254, S. C. For a history of the right to seize stock or shares in a corporation in this Province see the judgment of the Court in *Brock* v. *Ruttan*, *supra* per Macaulay, C. J. A question will frequently arise whether stock or shares held by a person domiciled in Ontario, in a corporation incorporated by the legislature of another Province or by the Dominion Parliament, and having its head office outside of this Province, are subject to seizure under a writ of attachment issued from the Courts of Ontario. It is submitted that they are not, see *Nickle* v. *Douglas*, 35 U. C. R. 126, in appeal, 37 U. C. R. 51, and particularly the remarks of Burton, J., at page 61 of the latter report, except by express statutory enactment as was held in the case of *In re Bank of Toronto*, 44 U. C. R. 247; see also, *In re North Scotland Mortgage Co.*, 31 C. P. 552.

It will be observed that the Sheriff is only entitled to "*necessary* disbursements" for keeping the property. These must be advanced by the plaintiff under section 14, and are subject to taxation under section 17. Large disbursements might be disallowed as unnecessary: *In re Blyth & Fanshawe*, 10 Q. B. D. 207.

The Sheriff would not only be liable for his own personal neglect or omission, but for that of his officers as well: *Smart* v. *Hutton*, 8 A. & E. 568; *Price* v. *Peck*, 1 Bing. N. C. 380; *Wright* v. *Child*, L. R. 1 Ex. 358; *Edwards* v. *L. & N. W. R'y Co.*, L. R. 5 C.P. 445; *Wright* v. *L. & N. W. R'y Co.*, L. R. 10 Q. B. 298, 1 Q. B. D. 252, S. C.; *King* v. *Spurr*, 8 Q. B. D. 104; *Markle* v. *Thomas*, 13 U. C. R. 321; *Finnigan* v. *Jarvis*, 8 U. C. R. 210; *Ross* v. *Grange*, 25 U. C. R. 396; *McGivern* v. *McCausland*, 19 C. P.

460; Watson on Sheriff, 44. In the latter work it is laid down that the Sheriff's "civil responsibility is not confined to the improper manner of executing what is commanded by his (the bailiff's) warrant, but extends to all acts however wrongful, provided they be done *under colour of the writ;*" see *Cook* v. *Palmer*, 6 B. & C. 739, even though against the Sheriff's express instructions: *Scarfe* v. *Halifax*, 7 M. & W. 288. Thus the Sheriff is liable where his officer, in executing a writ against the goods of A., takes the goods of B. But for something done by a Sheriff's officer entirely beyond his authority, the Sheriff could not be held responsible: *Mink* v. *Jarvis*, 8 U. C. R. 397; see also *Storey* v. *Ashton*, L. R. 4 Q. B 476; *Venables* v. *Smith*, 2 Q. B. D. 279; *Rayner* v. *Mitchell*, 2 C. P. D. 357.

If the Sheriff should seize goods not the property of the debtor without special directions so to do, the plaintiff could not be held responsible for it at the suit of the owner: *Woolen* v. *Wright*, 1 H. & C. 554; *Kennedy* v. *Patterson*, 22 U. C. R. 556. Whether a seizure of particular goods by a Sheriff was directed by a creditor so as to make him responsible for the act of the Sheriff, is a question of fact, and it is not within the scope of the *implied* authority of the solicitor of a creditor to direct the Sheriff to seize *particular* goods: *Smith* v. *Keal* 9 Q. B. D. 340. In view of this last mentioned case the authority of *Slaght* v. *West*, 25 U. C. R. 391, must not be accepted in its entirety; see also *Childers* v. *Wooler*, 2 E. & E. 287; *Cronshaw* v. *Chapman*, 7 H. & N. 911; *Tilt* v. *Jarvis*, 7 C. P. 145; *McLeod* v. *Fortune*, 19 U. C. R. 98.

The Sheriff cannot attach goods that are exempt from seizure; see Drake on Attachment, sec. 244; sec. 1, note (*i*).

It was held in *Nichols* v. *Valentine*, 36 Maine, 322, and the contrary in *Howe* v. *Stewart*, 40 Vermont, 145, that property the sale of which is penal cannot be attached; where, therefore, the sale of spirituous liquors was forbidden by

law, it was held that they could not be attached, because their subsequent sale under execution would be illegal; see Rev. Stat., chap. 181, sec. 39, and "The Canada Temperance Act, 1878," sec. 100, *et seq.* The writer is of opinion that such liquors are attachable. As to the rights, duties, and liabilities of Sheriffs generally in executing writs, see Fisher's Digest, 7806, 7872, 9714, L. R. Digest (1882), 3867; R. & J's Digest, 3509, 3566.

In *Carroll* v. *Potter* 1 E. & A. 341, Draper, C. J., at page 356, in speaking of the duties of the Sheriff after attachment, says:

"When the property and effects are thus taken, the Sheriff's duty, unless they are of a perishable nature, is to keep them until one of three things happens, viz.: (1) That the defendant in the writ of attachment puts in and perfects special bail, in which case such property and effects (or if they have been sold as perishable, then the net proceeds thereof) are to be restored and paid to him, unless the Sheriff has some other lawful ground for withholding them; or (2) that the plaintiff obtains judgment and issues execution, when the Sheriff's duty, with regard to selling, will be the same as in other cases, the distribution of the proceeds being rateable in cases coming within the 29th (now 28th) section of the Absconding Debtors' Act; or (3) if the plaintiff fails in his suit, then the Sheriff must restore the goods, unless he has some lawful ground to retain them. The effect of the attachment, therefore, is either to enforce the defendant to put in special bail or to hold his property to satisfy any judgment which the attaching creditor or creditors may recover."

(*e*) WHAT PROPERTY ATTACHABLE.

The words of this section are very comprehensive, and comprise almost every kind of property which a person can own. In Drake on Attachment, sec. 244, the author says,

in regard to the interests in and descriptions of personal property, subject to attachment: "The first general proposition on this point is, that property which cannot be sold under execution cannot be attached. Of course the correlative follows: that whatever may be sold under execution may be attached." Money *in specie* may be attached: *Turner* v. *Fendall*, 1 Cranch, 117; *Sheldon* v. *Root*, 16 Pick. 567; *Handy* v. *Dobbin*, 12 Johns. 220; and may be taken from the defendant's possession, if the officer can take it without violating the defendant's personal security: *Prentiss* v. *Bliss*, 4 Vermont, 513.

Bank notes may also be attached, and so may Treasury notes of the United States: *State* v. *Lawson*, 7 Arkansas, 391. The attaching creditor can acquire no greater right in attached property than the defendant had at the time of attachment. If others have acquired an interest in it, their rights are preferred to those of the attaching creditor: Drake on Attachment, sec. 245.

A chattel pawned is not attachable in an action against the pawner: Drake, sec. 245. Goods upon which freight is due cannot be attached without paying the freight: *De Wolf* v. *Dearborn*, 4 Pick. 466; and if the Sheriff should pay the freight in order to get the goods into his possession, he stands in respect to the lien for freight, in the place and has the rights of the carrier: *Thompson* v. *Rose*, 16 Conn. 71. An attachment cannot stop the right of *stoppage in transitu*: *O'Brien* v. *Norris*, 16 Maryland, 122. Whenever the property in personalty passes, it may generally be said that the right of attachment against the transferrer is gone: *Hatch* v. *Bayley*, 12 Cushing, 27.

Where property is sold and delivered upon condition that the title shall not vest in the vendee, unless the price agreed upon be paid within a specified time, the vendee has no attachable interest in the property until performance of the condition: *Buckmaster* v. *Smith*, 22 Vermont,

203: *McFarland* v. *Farmer*, 42 New Hamp. 386: *Nordheimer* v. *Robinson*, 2 App. R. 305. So property consigned to a factor cannot be attached: *Holly* v. *Huggeford*, 8 Pick. 73; nor property lent to one for his debt: *Morgan* v. *Ide*, 8 Cushing, 420; nor a vested remainder in personal property during the continuance of the life interest: *Carson* v. *Carson*, 6 Allen, 397.

A wife's property is not the subject of attachment against her husband: Drake 247, Rev. Stat., chap. 125, but would as against herself: *Berry* v. *Zeiss*, 32 C. P. 231.

The defendant's interest in personal property need not, in order to its being subject to attachment, be several and exclusive. An interest held by him in common with others may be attached and the property may be seized, though the rights of other joint owners may thereby be impaired: Drake, sec. 248; but their possession cannot be interfered with: *Ovens* v. *Bull*, 1 App. R. 62.

A growing crop of grass cannot be attached: *Norris* v. *Watson*, 2 Foster 364.

Where property is in the process of manufacture and transition, so as to be rendered useless, or nearly so, by having that process arrested and to require art, skill and care to finish it, and when completed it will be a different thing, it is not subject to attachment. Such are hides in vats in the process of tanning, which if taken out prematurely could never be converted into leather or restored to their former condition: *Bond* v. *Ward*, 7 Mass. 123. Such also are bakers' dough; materials in process of fusion in a glass factory; burning ware in a potter's oven; a burning brick kiln; or a burning pit of charcoal. In all such cases the Sheriff cannot be compelled to attach, for he should have the right of removal; and he is not bound to turn artist, or conduct in person or by an agent the process of manufacture, and be responsible to both parties for its successful termination: *Wilds* v. *Blanchard*, 7 Vermont 138.

But where a pit of charcoal was in part entirely completed so as not to require any further attention or labour, and the residue had so far progressed in the process that it was in fact completed, but some labour and skill were still necessary in order to separate and preserve it properly; it was held that if an officer saw fit to attach and take possession of it, and run the risk of being able to keep it properly, he had a right to do so; and that if any portion of the coal should, through the want of proper care and attention on his part, be destroyed, he could not be held responsible therefor, and that the attaching creditor was not liable unless the omissions were by his command or assent: *Hale* v. *Huntly*, 21 Vermont 147. A membership of a Board of Trade is not property, and cannot be attached: *Thompson* v. *Adams*, 93 Penn. 55; *Pancost* v. *Gowen*, 93 Penn. 66, and *Barclay* v. *Smith*, lately decided by the Supreme Court of Illinois.

Property *in custodia legis* cannot be attached. Goods in the possession of one officer cannot be attached by another: Drake, secs. 251 and 267. Money collected on execution by a public officer is not attachable: Drake, sec. 251, though it may be garnishable: *Bland* v. *Andrews*, 45 U. C. R. 431; Drake, 509. Goods in the actual use of the defendant would appear not to be attachable: Drake, sec. 252. The effects of public carriers, though used for carrying the mails, are not exempt: Drake 252 (*a*). It is not necessary that the defendant's property, in order to be subject to attachment, should be in his possession; it may be attached wherever found: *Livingston* v. *Smith*, 5 Peters, 90. "An officer in attaching personalty must actually reduce it to possession, so far as, under the circumstances, can be done; though in doing so, it is not necessary that any notoriety should be given to the act in order to make it effectual. What is an actual possession sufficient to constitute an attachment must depend upon the nature and position of

the property. In general it may be said, that it should be such a custody as will enable the officer to retain and assert his power and control over the property, so as that it cannot probably be withdrawn, or taken by another, without his knowing it:" Drake on Attachment, sec. 256. It is not necessary for the Sheriff to *touch* the property: *Ib.* As to what constitutes a seizure see *Gladstone* v. *Padwick*, L. R., 6 Ex. 203; *Hincks* v. *Sowerby*, 4 App. R. 113; *Consolidated Bank* v. *Bickford*, 7 P. R. 172; *May* v. *Standard Fire Ins. Co.*, 30 C. P. 51: Drake on Attachment, sec. 256. If the Sheriff should abandon the seizure, the attachment would be lost; see cases cited at pages 176 and 177 of Sinclair's D. C. Act: *Craig* v. *Craig*, 7 P. R. 209; *McMaster* v. *Meakin*, 7 P. R. 211; Drake on Attachment, sec. 257. With regard to large and unmanageable articles incapable of actual handling, a constructive possession is sufficient: *Hemmenway* v. *Wheeler*, 14 Pick. 408; *Polley* v. *Lenox Iron Works*, 4 Allen 329; *Mills* v. *Camp*, 14 Conn. 219; *Pond* v. *Skidmore*, 40 Conn. 213. Where the removal of attached property would result in great waste and expense, it was held in the last two cases, that if the officer exercised due diligence to prevent its going out of his control, such removal could be dispensed with. There should be as complete a taking and continuing in possession as the nature of the property allowed; see notes to sections 1 and 2, as to the nature of the property seizable. The Sheriff should not allow the property to remain in the possession of the debtor's family, or constitute them his agents, to keep the property, as being *prima facie* evidence of the attachment being fraudulent: Drake on Attachment, sec. 292 a.

(*f*) THE INVENTORY.

The Sheriff must call in two substantial freeholders of his county for the purpose of assisting him in making out a just and true inventory. The inventory should particu-

larize the property seized, so that the articles could be identified with reasonable certainty: Drake on Attachment, sec. 208. The section does not say that the "freeholders" shall be first sworn, as does section 192 of the Division Courts Act: therefore they need not be, nor need any appraisement be made, the Act not requiring that either. The inventory must be signed by the Sheriff and the two freeholders, and returned with the writ of attachment. If, however, any of the goods are perishable property, within the meaning of section 14, then an appraisement *must* be made, as required by that section. For his own protection the Sheriff should keep copies of inventory and appraisement.

PERISHABLE PROPERTY.

How perishable goods shall be dealt with.

14. In case any horses, cattle, sheep, pigs, or any perishable goods or chattels (*g*), or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, are taken under any writ of attachment, the Sheriff who attached the same shall have them appraised and valued (*h*), on oath, by two competent persons; and in case the plaintiff desires it and deposits with the Sheriff a bond (*i*) to the defendant executed by two freeholders (*j*) (whose sufficiency shall be approved of by the Sheriff) (*k*), in double the amount of the appraised value of such articles, conditioned for the payment of such appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the Sheriff shall proceed to sell (*l*) all or any of such enumerated articles at public

auction, to the highest bidder, giving not less than six days' notice of such sale, unless any of the articles are of such a nature as not to allow of that delay, in which case the Sheriff may sell such articles last mentioned forthwith; and the Sheriff shall hold the proceeds (*m*) of such sale for the same purposes as he would hold any property seized under the attachment. C. S. U. C. c. 25, s. 15.

Sheriffs to hold proceeds.

(*g*) PERISHABLE PROPERTY.

This provision is made with a view of realizing as much as possible out of the debtor's goods.

The section contemplates three classes of property: (1) Horses, cattle, sheep or pigs; (2) any perishable goods or chattels; (3) or such other chattels as from their nature (such as timber or staves) cannot be safely kept or conveniently taken care of. As to the first class the words are clear and no doubt can arise. As to the second, the circumstances of each particular case must determine the question whether or not they are the subject of sale. The third class includes a different kind of property from the other two. If, from its nature position or otherwise, the property referred to in the third class cannot be safely kept or conveniently taken care of, then it too can be sold. The Sheriff must exercise reasonable judgment in determining the questions which may arise under this section. If he acted negligently or in an unreasonable manner and loss occurred, he could be held responsible for it. The section does not limit the property in the third class to "timber or staves" only. These words are used by way of example. Such

property as cordwood, tanbark, railway-ties, telegraph poles and other property of that description would equally be within the section.

In addition to the power to sell here given, the legislature has, by 45 Victoria, chapter 6, section 4, given a further right. It is in these words: "The Court out of which a writ of attachment issues, or a Judge having authority to make orders therein, may, at any time after a writ of attachment has been in the hands of a Sheriff or other officer for one month, direct such Sheriff or other officer to sell any goods or chattels, except chattels real, which have been attached under such writ.

"An order for sale may be made upon the application of any creditor having a writ of attachment or a writ of execution in the hands of the Sheriff, and shall be made wherever the Judge is satisfied that the alleged debtor has in fact absconded indebted to the applicant, and that the property attached, is not sufficient to pay in full the claims of the persons who have sued out writs of attachment or execution, but this provision shall not be construed to restrict the authority of the Court or Judge to make an order in other cases; and in all cases the Court or Judge may impose such terms as are deemed fitting."

The month's time mentioned in the section just quoted, will exclude the day the Sheriff received the writ. It will be observed that the clause confines the sale to "goods and chattels except chattels real." Cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money or policies of life assurance, would not be the subject of sale under this section; see Arch. Pract. 12th Ed. 658, and cases there cited. *Any* creditor who has a writ of attachment or writ of execution in the Sheriff's hands can apply. It would seem that the language of this new section does not apply to Division Court attachments. For forms of affidavit and order see the appendix.

(*h*) APPRAISED AND VALUED.

Having decided that the goods are the subject of sale under this section the next duty of the Sheriff is to have them appraised and valued "*on oath* by two competent persons." No provision is made for the appraisers being sworn by the Sheriff, as a Division Court Bailiff is empowered to do in attachment proceedings in that Court, under the 192nd section of the Division Courts Act. The oath had therefore better be in the form of an affidavit entitled in the Court and cause, a form of which will be found in the appendix. The appraisers must be sworn *before* they make their appraisement: *Kenny* v. *May*, 1 M. & Rob. 56. If the Sheriff should sell without an appraisement, he would be liable to an action; but the sale to a *bona fide* purchaser would not thereby be void: *Lyon* v. *Weldon*, 2 Bing. 334; *Campbell* v. *Coulthard*, 25 U. C. R. 621. *Both* appraisers must be sworn: *Allen* v. *Flicker*, 10 A. & E. 640, and must be reasonably competent: *Roden* v. *Eyton*, 6 C. B. 427. The statute speaks of the goods being "appraised *and valued.*" If possible a separate valuation should be made of each article, but if from the nature of the property attached that cannot be done, then it should be done in the best manner possible. The Sheriff would not be concluded by the valuation: *Denton* v. *Livingston*, 9 Johnson, 96; but it will be considered *prima facie*, a just and fair valuation, and the *onus* would be on him to establish the contrary: *Pierce* v. *Strickland*, 2 Story, 292.

(*i*) PLAINTIFF MAY GIVE A BOND.

The bond here prescribed is intended as a protection to the defendant, to whom it must be made. The plaintiff has his election whether he will give the bond, and have the perishable property sold or not. If he do not so elect the Sheriff cannot sell. The option of giving the bond and

having a sale is entirely with the plaintiff. If the bond is not given, the Sheriff returns the goods under section 15. When property is of such a nature, that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to the defendant's private papers: *Oystead* v. *Shed*, 12 Mass. 506. This rule applies also in relation to property, which is in its nature so peculiarly perishable, that *manifestly* the purpose of the attachment cannot be effected before it will decay, and become worthless, as for instance fresh fish, green fruits and the like: *Wallace* v. *Barker*, 8 Vermont 440; *Penhallow* v. *Dwight*, 7 Mass. 34. It should clearly appear that the seizure of such property would not be productive of any benefit, in order to excuse the Sheriff in attaching it.

(*j*) EXECUTED BY TWO FREEHOLDERS.

The section does not prescribe any particular county in which the "freeholders" must reside; see *Lovell* v. *Sheriffs of London*, 15 East 320; nor does it declare that the plaintiff shall not be one of the obligors. To save all questions he had better not be one of them. For form of bond and affidavits see appendix.

(*k*) BOND TO BE APPROVED OF BY SHERIFF.

The Sheriff is bound to exercise reasonable care and judgment in taking the bond, and should he neglect to do so he would be liable. The bond must comply with the statute: *Daniels* v. *Charsley*, 11 C. B. 739; *Peacock* v. *The Queen*, 4 C. B. N. S. 264; *Stone* v. *Dean*, E. B. & E. 504; *Norris* v. *Carrington*, 16 C. B. N. S. 10. But a substantial compliance with the statute will be sufficient: *Curiac* v. *Packard*, 29 California, 194. The appraisement must be made before the bond is given, so that the penalty of the bond may be properly determined, viz.: double the amount of the appraised value of the property.

(*l*) SHERIFF SHALL THEN SELL.

The Sheriff should give six "clear" days notice of sale, but if any of the property is of such a nature as not to permit of the delay, he must sell "forthwith." The property must be sold by public auction and to the highest bidder, and any other mode of sale would not give a title: *Ex parte Hall; In re Townsend*, 14 Ch. D. 132; *Samis* v. *Ireland*, 4 App. R. 118, and especially at page 141.

(*m*) SHERIFF TO HOLD PROCEEDS OF SALE.

This means the *gross* proceeds of sale, for the Sheriff is presumed to have had his costs and charges advanced to him by the attaching creditor, under section 17. See section 12 where "*net proceeds*" are mentioned. The full proceeds of the sale are to lie in the Sheriff's hands in lieu of the goods sold.

Such goods to be restored if plaintiff fails to give sufficient security.

15. If the plaintiff, after notice to himself or his attorney of the seizure of any articles enumerated in the last preceding section, neglects or refuses to deposit such a bond, or only offers a bond with sureties insufficient in the judgment of the Sheriff, then, after the lapse of four days next after such notice, the Sheriff shall be relieved from all liability to such plaintiff in respect to the articles so seized, and the said Sheriff shall forthwith restore (*n*) the same to the person from whose possession he took such articles (*o*). C. S. U. C. c. 25, s. 16.

(*n*) GOODS TO BE RESTORED.

Should any property of the description mentioned in section 14 be seized by the Sheriff, it would be his duty forthwith to give notice to the plaintiff or his solicitor of such seizure. The notice need not be in writing as the statute does not so require it: *Regina* v. *Nichol*, 40 U. C. R. 76; but as a matter of precaution it had better be so. The plaintiff has four days next after he receives notice of the seizure to give the bond. Should the notice be given by the Sheriff, for instance, on the first of any month the time for putting in the bond duly approved by the Sheriff would be

up to twelve o'clock on the night of the fifth of the same month, and should that day fall on a Sunday it could probably be put in on the next day; see note (*b*) to section 5. If the bond should not be put in within the proper time, it would be the duty of the Sheriff forthwith to restore the goods to the possession of the person from whom they were taken. If the bond should not be put in within the time, it could not be done afterwards as the statute makes no provision for that: *Barker* v. *Palmer*, 8 Q. B. D. 9. Should the Sheriff in collusion with the defendant or fraudulently refuse to approve of what might reasonably be considered a sufficient bond, it is submitted that the plaintiff should not be considered as having neglected or refused to give the necessary bond: see *Batterbury* v. *Vyse*, 2 H. & C. 42; *Sharpe* v. *San Paulo Railway Co.*, L. R. 8 Chan. 597, 612; *Ex parte Luxon; In re Pidsley*, 20 Ch. D. 701; Sinclair's D. C. Act, 1880, page 19.

(*o*) SHERIFF RELIEVED OF LIABILITY.

So long as the Sheriff has the custody of the property attached, which it is his duty to have (see notes to section 13) his liability continues: Drake on Attachment, chapter 12. He should restore the goods to the possession of the person from whom they were taken. Whether he be the owner of them or not, the Sheriff would then be relieved of further liability as to such goods.

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

Proceeding if Sheriff finds property in the hands of a Bailiff or Clerk of a Division Court.

16. If any Sheriff to whom a writ of attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable (*p*), belonging to the absconding debtor named in such writ of attachment, in the hands, or in the custody and keeping of any Constable or of any Bailiff or Clerk of a Division Court by virtue of any warrant or warrants of attachment issued under "*The Division Courts Act*," such Sheriff shall demand and take (*q*) from such Constable, Bailiff or Clerk, all such property or effects, or the proceeds of any part thereof as aforesaid, and such Constable, Bailiff or Clerk, on demand by such Sheriff and notice of the writ of attachment, shall forthwith deliver (*r*) all such property, effects and proceeds as aforesaid to the Sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by such Sheriff, with costs of suit, and to be by him accounted for after deducting his

Rev. Stat. c. 47.

own costs, as part of the property and effects of the absconding debtor; but the creditor or creditors who have duly sued out such warrant or warrants of attachment may proceed to judgment (*s*) against the absconding debtor in the Division Court, and on obtaining judgment, and serving a memorandum of the amount thereof, and of the costs to be certified under the hand of the Clerk of the Division Court, every such creditor shall be entitled to satisfaction in like manner as, and in rateable proportion with, the other creditors of the absconding debtor who obtain judgment as hereinafter mentioned. C. S. U. C. c. 25, s. 17.

Creditor in Division Court may proceed to judgment.

(*p*) PERISHABLE PROPERTY, ETC., WITH DIVISION COURT OFFICER.

It is the duty of the Sheriff to make all reasonable inquiry for such property or the proceeds of it in the hands of any Constable, Division Court Clerk or Bailiff under attachment from such Court; see Sinclair's D. C. Act, 204. It will be observed that the section only refers to property or money held under Division Court attachment. Goods seized under an execution from a Division Court or the proceeds of sale in the officer's hands would not come within this section. Had the attaching creditor obtained judgment and had his execution been in the Sheriff's hands, the rights of a previous judgment creditor, under Division Court proceedings, could not be interfered with under this section: Rev. Stat. chap. 66, sect. 33; *Macfie* v. *Hunter*, 9 P. R. 149. The attaching creditor cannot stand in any higher position where he has only issued an attachment.

(*q*) SHERIFF SHALL DEMAND GOODS, ETC.

On demand made by the Sheriff, the goods unsold or proceeds of any sold must be delivered up to him. The section does not require the demand to be in writing, so that it need not be: *Regina* v. *Nichol*, 40 U. C. R. 76. For precaution, however, it had better be so.

(*r*) MUST BE DELIVERED UP FORTHWITH.

Where an Act has to be done "forthwith," the language implies "prompt vigorous action without any delay": *Regina* v. *Berkshire*, Justices, 4 Q. B. D., at page 471, per Cockburn, C.J.; but the word must be construed with regard to the object of the statutory provision and the circumstances of the case: *Ex parte Lamb; In re Southam*, 19 Ch. D. 169. The penalty for refusal of the Constable, Division Court Clerk or Bailiff, is fixed at double the value of the goods or proceeds, with costs of suit. If the amount sued for did not exceed $60, the Sheriff could sue in the Division Court and up to $200 in the County Court: *In re Apothecaries Co.* v. *Burt*, 5 Ex. 363; *Medcalfe* v. *Widdifield*, 12 C. P. 411; *Brash qui tam* v. *Taggart*, 16 C. P. 415; *Austin* v. *Davis*, 7 App. R. 478. The Sheriff could sue in the High Court for the smallest sum, but at peril of losing costs: *Rex* v. *Rochdale Canal Co.*, 14 Q. B. 138, per Parke, B.

(*s*) CREDITOR MAY PROCEED TO JUDGMENT.

On obtaining judgment the attaching creditor in the Division Court is on the certificate of the Clerk of that Court entitled to participate equally with judgment creditors in other Courts; see section 29. For form of certificate see appendix.

SHERIFF'S COSTS.

Sheriff's costs, and how paid.

17. The costs of the Sheriff (*t*) for seizing and taking charge of property, credits and effects under a writ of attachment, including the sums paid to any persons for assisting in taking an inventory, and for appraising (which shall be paid for at the rate of one dollar for each day actually required for and occupied in making such inventory or appraisement) shall be paid in the first instance by the plaintiff, and may, after having been taxed, be recovered by the Sheriff by action (*u*) in any Court, having jurisdiction to the amount, and such costs shall be taxed to the party who pays the same as part of the disbursements in the suit against the absconding debtor, and be so recovered from him. C. S. U. C. c. 25, s. 18.

(*t*) SHERIFF'S COSTS.

The Sheriff's costs of seizure and taking charge of the property, including the expenses of persons making the inventory and appraisement shall first be advanced by the attaching creditor. This section provides that these costs may be taxed. It is again to be remarked that this statute

contemplates more than a bare seizure such as was made in *Gladstone* v. *Padwick*, L. R. 6 Ex. 203. The section speaks of "seizing *and taking charge of property*." See the notes to section 18.

(*u*) HE MAY SUE FOR SAME.

Provision is here made that the Sheriff may sue for his costs, but they must *first* be taxed. The section does not say whom he may sue. Certainly not the defendant, for there is no privity between them, so that it can only mean the plaintiff in the attachment suit, provided he has not previously advanced the costs and expenses.

18. The Sheriff having made an inventory and appraisement on the first writ of attachment against any absconding debtor, shall not be required to make a new inventory (*v*) and appraisement on a subsequent writ of attachment coming into his hands, nor shall he be allowed any charge for an inventory or appraisement, except upon the first writ. C. S. U. C. c. 25, s. 19. New writ not to make new inventory requisite.

(*v*) SECOND INVENTORY NOT REQUIRED.

The inventory and appraisement which the Sheriff is required to make, on the first writ of attachment will be found referred to in the notes to sections 13 and 14. Having performed the duty once, its repetition would be unnecessary.

COSTS IN CASE OF ATTACHMENT NOT WARRANTED.

When defendant to recover costs of defence.

19. If, at any time before execution issues, it appears to the Court upon motion (*w*) and upon hearing the parties by affidavit, that the defendant was not an absconding debtor within the true meaning of this Act, at the time of the suing out of the writ of attachment against him, such defendant shall recover his costs of defence, (*x*) and the plaintiff shall, by rule of Court, be disabled from taking out any writ of execution for the amount of the verdict rendered or ascertained upon reference or otherwise recovered in such action, unless the same exceeds, and then for such sum only as the same exceeds, the amount of the taxed costs of the defendant, and in case the sum so recovered is less than the taxed costs of the defendant, then the defendant shall be entitled, after deducting the amount of the sum recovered from the amount of such taxed costs, to take out execution for the balance in like manner, as a defendant may now by law have execution for costs in ordinary cases. C. S. U. C. c. 25, s. 20.

(*w*) HOW APPLICATION MADE.

The application must be made to the Court, but why provision is not made for applying to a Judge as well, is difficult to see. It must be made *before* execution issues, and that fact should plainly appear on the application. The fact that defendant was not an absconding debtor would have to be made out very clearly. See the notes to section 2. It is submitted, however, that if the defendant could shew *any one* of the pre-requisites of attachment proceedings wanting, his application must be successful. The first and second sections shew who shall be deemed an absconding debtor within the Act, and if the facts of the case do not shew the existence of *all* that is necessary to establish that fact, the defendant can take advantage of this section. A Judge in Chambers could not entertain the application: *per* Brett, J.A., in *Baker* v. *Oakes*, 2 Q. B. D., at page 178.

(*x*) FOR COSTS OF DEFENCE.

This means the taxed costs as between party and party. Costs as between solicitor and client to be taxable against the opposite party, must be the subject of statutory provision: *Whitehead* v. *Firth*, 12 East, 165; Gray on Costs, chap. 18, page 181. A somewhat similar provision is to be found in section 348 of the Common Law Procedure Act in regard to improper arrests. It is submitted that if the defendant is held entitled to his costs of defence under this section, the plaintiff has no right to *any* costs: *Burrows* v. *Lee*, Easter Term, 3 Vict. R. & H.'s Digest, 136; *Hope* v. *Fenner*, 2 C. B. N. S. 387; *Deere* v. *Kirkhouse*, 1 L. M. & P. 783; *Porritt* v. *Fraser*, 8 P. R. 430; *Offay* v. *Offay*, 26 U. C. R., at page 367, per Hagarty, J. The defendant would probably be allowed the costs of the application: *Higson* v. *Phelan*, 1 P. R. 24; *Porritt* v. *Fraser*, *supra*; *Lyght* v. *Canute*, 6 P. R. 181.

20. Repealed by 45 Vict. chapter 6, section 4, sub-section 4.

Instead of the repealed clause the new statute contains the following section: "No writs of execution received by a Sheriff or other officer after the receipt of a writ of attachment, shall take priority of the writ of attachment, but all writs of execution placed in the hands of the Sheriff, or other officer, prior to the distribution of the proceeds of the effects attached, shall, subject to any priority given for costs incurred under the first writ of attachment, rank rateably in proportion to the sums actually due thereon, whether or not any of the writs of execution are, or is, founded upon a writ of attachment."

On comparing this section with the repealed clause, it will be seen that the object of the legislature was to take away that priority, which a certain class of creditors could obtain under the old section. *All* creditors having writs in the hands of the Sheriff or other officer, "prior to the distribution of the proceeds of the effects attached," are now entitled to rank rateably in proportion to the amounts actually due, and it matters not that some of such executions may be founded on attachment proceedings. This amendment of the law would appear also to change the effect of section 28, and to do away with the six months' limit prescribed by section 30, and make the distribution of the proceeds the test of a creditor's right to participate.

The following cases show how the section was interpreted when in force: *Bank B. N. A.* v. *Jarvis*, 1 U. C. R. 182; *Daniel* v. *Fitzell*, 17 U. C. R. 369; *Nicol* v. *Ewin*, 7 P. R. 331; *Caird* v. *Fitzell*, 2 P. R. 262; *Bird* v. *Folger*, 17 U. C. R. 536; *Bank U. C.* v. *Glass*, 21 U. C. R. 39; *Potter* v. *Carroll*, 9 C. P. 442; *Carroll* v. *Potter*, 1 E. & A. 341; S. C. 7 U. C. L. J. 42; *Hughes* v. *Field*, 9 P. R. 127.

21. Repealed by 45 Vict. chapter 6, section 4, sub-section 4.

As to attacking fraudulent judgments, see *Bergin* v. *Pindar*, 3 O. S. 574; *Bank of Montreal* v. *Baker*, 9 Grant, 298; *Armour* v. *Carruthers*, 2 P. R. 217; *Caird* v. *Fitzell*, 2 P. R. 262; *Wilson* v. *Wilson*, 2 P. R. 374; *Ritchie* v. *Worthington*, 7 U. C. L. J. 208; *Klein* v. *Klein*, 7 U. C. L. J. 296; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *White* v. *Lord*, 13 C. P. 289; *Bevan* v. *Wheat*, 14 C. P. 51; *Dickson* v. *McMahon*, 14 C. P. 521; *Girdlestone* v. *The Brighton Aquarium Co.*, 4 Ex. D. 107; *Turner* v. *Lucas*, 1 Ont. R. 623; Fisher's Digest, 5049, 9584; Law Reports Digest, 2015; Rob. & Joseph's Digest, 1612, 4195; *Shedden* v. *Patrick*, 1 Macqueen, H. L. 535; Kerr on Fraud, 232; Drake on Attachment, chap. 11; *Cammell* v. *Sewell*, 3 H. & N. 617; *Crawley* v. *Isaacs*, 16 L. T. N. S. 529; *Flower* v. *Lloyd*, 10 Ch. D. 327; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

(Surely this section must have been repealed in mistake.)

ATTACHMENT OF DEBTS DUE TO ABSCONDING DEBTOR.

Proceedings against persons paying debts to absconding debtor after notice of the seizure.

22. In case notice in writing (*x*) of the writ of attachment has by the Sheriff, or by or on behalf of the plaintiff in such writ, been duly served upon any person owing any debt or demand to, or who has the custody or possession of any property or effects of, an absconding debtor, and in case such person after such notice pays any such debt or demand or delivers any such property or effects to such absconding debtor, or to any any person for the individual use and and benefit of such absconding debtor, he shall be deemed to have done so fraudulently, and if the plaintiff recovers judgment against the absconding debtor, and the property and effects seized by the Sheriff are insufficient to satisfy such judgment, such person shall be liable for the amount of such debt or demand, and for such property and effects or the value thereof. C. S. U. C. c. 25, s. 23.

(*x*) NOTICE OF ATTACHMENT TO BE GIVEN.

Parties who owed the absconding debtor, or had the custody or possession of any property or effects of his,

might, in ignorance of the attachment proceedings, discharge their liability by payment of their debts, or delivering back the property. This section protects such debts or property for the benefit of the attaching creditor upon notice being given. The section says, "notice in writing." It is submitted however, that the notice would be good, although not in writing, if containing that information which the notice should if given properly, contain: *Lanark & Drummond, Plank Road Co.* v. *Bothwell*, 2 U. C. L. J. 229; *Lucas* v. *Dicker*, 6 Q. B. D. 84; Drake on Attachment, chap. 17. The notice *in writing* should not be omitted however, a form of which will be found in the appendix. After notice given, any payment made or property delivered up to the absconding debtor, or any one for him, would be no discharge, the statute making such "fraudulent." *Dennison* v. *Knox*, 24 U. C. R. 119; *Jeffs* v. *Day*, L. R. 1 Q. B. 372; *Watson* v. *Mid-Wales Ry. Co.* L. R. 2 C. P. 593; *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175; *Chishom* v. *Provincial Ins. Co.* 20 C. P. 11; *DePothonier* v. *DeMattos*, E. B. & E. 461; *Wilson* v. *Gabriel*, 4 B. & S. 243; *Dickson* v. *Swansea Vale Ry. Co.* L. R. 4 Q. B. 44; *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387; *Re Assam Tea Co. Ex parte Universal Life Assurance Co.* L. R. 10 Eq. 458; *Re Imperial Land Co. of Marseilles*; *Ex parte Colborne & Strawbridge*, L. R. 11 Eq. 478; *McGiverin* v. *Turnbull*, 32 U. C. R. 407; Drake on Attachment, chap. 24.

The statute does not contemplate the payment of the debt owing to the defendant, or the delivery of the property being made to the Sheriff. His duty is simply conservatory of the rights of the attaching creditor, which when performed, will place the person to whom notice is given, so far as the circumstances will permit, in the position of a garnishee. Should the other property prove insufficient, then the debts or property and effects mentioned in this section would be liable for the deficiency. Should the

other property prove sufficient, the parties owing the debts or demands, or who had the custody or possession of any property or effects concerning which, notice had been given, would be restored to their original rights and position. Should the plaintiff fail to recover against the original debtor in the attachment suit, the debts and property would be relieved. The notice may be given either by the Sheriff *or* by, or on behalf of the plaintiff in the writ of attachment. Whether the absence of authority to give such notice could be ratified is questionable; see Sinclair's D. C. Act, 182 (*g*) The claim must be in the form of a "debt or demand;" see notes to section 2, and not in the form of an unliquidated claim; see also, *Clarke* v. *Proudfoot*, 9 U. C. R. 290.

Defendant's debtor sued by him after the seizure, may obtain stay of proceedings.

23. If after notice as aforesaid of a writ of attachment, any person indebted to the absconding debtor, or having custody of his property as aforesaid, is sued (*y*) for such debt, demand or property by the absconding debtor, or by any person to whom the absconding debtor has assigned such debt or property since the date of the writ of attachment, he may, on affidavit, apply to the Court or a Judge, to stay proceedings in the action against himself, until it is known whether the property and effects so seized by the Sheriff, are sufficient to discharge the sum or sums recovered against the absconding debtor, and the Court or Judge may make such rule or order in the matter as the Court or Judge thinks fit, and if necessary may direct an issue to try any disputed question of fact. C. S. U. C. c. 25, s. 24.

(*y*) DEFENDANT'S DEBTOR SUED.

This section is intended to afford protection to the debtors of an absconding debtor, or those who may have the custody or possession of any of his property as mentioned in section 22. Should such persons be sued, then this provision gives

authority to stay the action until it is known whether the property and effects seized by the Sheriff are sufficient to discharge the amount recovered against the absconding debtor. The result of an application must, of course, depend on the circumstances of each particular case. An interpleader issue may, if necessary, be directed. As to the form of which, and the question to try, see *Doyle* v. *Lasher*, 16 C. P. 263; *Snarr* v. *Smith*, 45 U. C. R. 156. As to interpleader generally, see Fisher's Digest, 4970-4999; R. and J.'s Digest, 1892-1904-4578; Arch. Pract., 12th Ed., 1391; Lush's Pract., 3rd Ed., 777; L. R. Digest, 1880, p. 1993, *et seq.*; Sinclair's D. C. Act, 214, *et seq.*; Chitty's Forms, 11th Ed., 672; and the later cases of: *Hills* v. *Renny*, 5 Ex. D. 313; *Picken* v. *Victoria Ry. Co.*, 44 U. C. R. 372; *Black* v. *Drouillard*, 28 C. P. 107; *Clarke* v. *Farrell*, 31 C. P. 584; *Richardson* v. *Shaw*, 6 P. R. 296; *Watson* v. *Henderson*, 6 P. R. 299: *Wilkins* v. *Peatman*, 7 P. R. 84; *Carter* v. *Stewart*, 7 P. R. 85; *Craig* v. *Craig*, 7 P. R. 209; *Boswell* v. *Pettigrew*, 7 P. R. 393; *Wilson* v. *Wilson*, 7 P. R. 407; *Strange* v. *Toronto Tel. Co.*, 8 P. R. 1; *Masuret* v. *Lansdell*, 8 P. R. 57; *Phipps* v. *Beamer*, 8 P. R. 181; *Clarke* v. *Farrell*, 8 P. R. 234; *Can. B. of Commerce* v. *Tasker*, 8 P. R. 351; *Turner* v. *Bridgett*, 9 Q. B. D. 55; *Williams* v. *Mercier*, 9 Q. B. D. 337; *Hartmont* v. *Foster*, 8 Q. B. D. 82; *Cramer* v. *Matthews*, 7 Q. B. D. 425; *In re Turner* v. *Imperial Bank*, 9 P. R. 19; *Macfie* v. *Hunter*, 18 L. J., N. S. 75; *Hunter* v. *Vanstone*, 18 L. J., N. S. 366: *Coulson* v. *Spiers*, 19 L. J., N. S. 233; *Leeson* v. *Leeson*, 9 P. R. 103; *Beaty* v. *Bryce*, 9 P. R. 320.

WHEN SHERIFF MAY SUE FOR OUTSTANDING DEBTS.

Debtor of defendant may be sued if defendant's property seized is not sufficient to satisfy plaintiff.

24. If the real and personal property, credits and effects of any absconding debtor attached by any writ of attachment as aforesaid, prove insufficient to satisfy the executions obtained in the suit thereon against such absconding debtor, the Sheriff having the execution thereof may, (*z*) by rule or order of the Court or a Judge, to be granted on the application of the plaintiff in any such case, sue for and recover from any person indebted to such absconding debtor, the debt, claim, property or right of action attachable under this Act, and owing to or recoverable by such absconding debtor, with costs of suit, in which suit the defendant shall be allowed to set up any defence which would have availed him against the absconding debtor at the date of the writ of attachment, and a recovery in such suit by the Sheriff shall operate as a discharge as against such absconding debtor; and such Sheriff shall hold the moneys recovered by him as part of the assets of such absconding debtor, and shall apply them accordingly. C. S. U. C. c. 25, s. 25.

(*z*) PROCEDURE AND SHERIFF'S RIGHTS.

This section permits, under certain circumstances, the Sheriff to obtain an order for him to sue for and recover from any person indebted to the absconding debtor, any debt, claim, property or right of action, attachable under this Act, and which at the time of the application is owing to or recoverable by such absconding debtor, together with costs of suit. In such suit the debtor is allowed to set up any defence that he could have set up at the date of the attachment, if the action had been brought against him by the absconding debtor. It will be observed how extensive the language here employed is, in regard to the subject matter of the order. The words, "debt claim, property or right of action attachable under this Act," appear to comprise nearly everything attachable of the nature of personal property, estate or effects.

Before application can be made it must be made clearly to appear that *all* the property, credits and effects attached, real, as well as personal, are insufficient to satisfy the executions against the debtor.

In *Cleaver* v. *Fraser*, 3 U. C. L. J. 107, the order was granted by Burns, J., on an *ex parte* application, and that practice has generally been followed since. In that case the affidavits were made by the Sheriff and the plaintiff; that of the Sheriff shewing that the real and personal property and effects of the defendant, were insufficient to satisfy plaintiff's judgment, and that of the plaintiff stating the issuing of the writ of attachment, the recovery of the judgment, that it was still partially unsatisfied, that all the real and personal property of the defendant had been exhausted, and was insufficient to satisfy his judgment, and that several persons within the jurisdiction of the Court were indebted to the defendant. It was held in the case of *Thompson* v. *Farr*, 6 U. C. R. 387, (the statute

then allowing the attaching creditor to sue) that a creditor could only have a verdict for *such part* of the amount of a promissory note as was equal to the amount due to him by the absconding debtor. But this was owing to the words used in the 12th section of chapter 5 of the Statute 2nd Will. IV., then in force. The language of this section is quite different. It gives the right of action to the Sheriff after leave is obtained from the Court or a Judge, on the application of the plaintiff, and is not confined to part of a cause of action. The order for such leave would not be granted to sue claims generally; but only such as might be necessary and reasonably sufficient, "to satisfy the executions obtained in the suit" against the absconding debtor. The order should give the names of the parties, their places of residence, the nature of the debt, and the amounts to be sued for.

In *Cann* v. *Thomas*, 17 U. C. R. 9, it was held that the Sheriff should distribute money acquired by suit under this section, among the attaching creditors only. The recent statute: 46 Vic., chap. 6, sec. 4; would appear to give *all* execution creditors an equal right to participate. From the concluding words of this section, and the case of *Cann* v. *Thomas*, *supra*, it appears to be pretty clear, that although one creditor may obtain the order for the Sheriff to sue, yet when he obtains the fruits of such suit the creditor who obtained the order has no greater rights than other execution creditors upon the moneys realised.

To those who may have occasion to take proceedings under this section, it is recommended that reference be first made to: *Thompson* v. *Farr*, 6 U. C. R. 387; *Cann* v. *Thomas*, 17 U. C. R. 9; *Taylor* (Sheriff) v. *Brown*, 17 C. P. 387, and *Reynolds* (Sheriff) v. *Pearce*, 14 C. P. 369. The Sheriff is not bound to sue unless duly indemnified under section 26. The rights of the person sued are by this section preserved to him, and he can set up any defence that he

might have done, had the action been brought against him by the absconding debtor instead of the Sheriff. In the absence even of express statutory enactment, probably a debtor would equitably have all the rights of defence that he would have had if his creditor had sued. See Waterman on Set-off, sec. 17, and following sections. The Sheriff can have no greater rights than the absconding debtor had, therefore, if the debt was assigned before the issue of the attachment, the assignment of the debt would prevent the Sheriff's recovery: *Clarke* v. *Proudfoot*, 9 U. C. R. 290; Drake on Attachment, sec. 245. The same result would follow if the money was garnished: *Holmes* v. *Tutton*, 5 E. & B. 65; *Tilbury* v. *Brown*, 6 Jur. N. S. 1151; *Turner* v. *Jones*, 1 H. & N. 878; *Sykes* v. *B. & O. Ry. Co.*, 22 U. C. R. 459; *Tate* v. *Corporation of Toronto*, 10 U. C. L. J. at p. 66; *Culverhouse* v. *Wickens*, L. R. 3 C. P. 295; *Re Fair and Bell*, 2 App. R. 632; *Wood* v. *Dunn*, L. R. 2 Q. B. 73; *Mitchell* v. *Goodall*, 5 App. R. 164; *In re Cowans' Estate, Rapier* v. *Wright*, 14 Ch. D. 638; *Leaming* v. *Woon*, 7 App. R. 42; Sinclair's D. C. Act, 147 *et seq.*; Act of 1880, 98 *et seq.* So also if proceedings were taken under the Mechanics' Lien Acts before the issue of the attachment: Drake on Attachment, 223 and cases there cited; Rev. Stat. chap. 120; 41 Vic. chap. 17; R. & J.'s Digest, 2118; *Burritt* v. *Renihan*, 25 Grant, 183; *McCormick* v. *Bullivant*, 25 Grant, 273; *Douglas* v. *Chamberlain*, 25 Grant, 288; *Broughton* v. *Smallpiece*, 25 Grant, 290; *Richards* v. *Chamberlain*, 25 Grant, 402; *Breeze* v. *Midland Ry. Co.*, 26 Grant, 225; *Hynes* v. *Smith*, 27 Grant, 150; *Briggs* v. *Lee*, 27 Grant, 464; *Neill* v. *Carroll*, 28 Grant, 30.

It may be stated generally that the just rights of other parties, acquired *before the execution* of the attachment, could not be affected by an action by the Sheriff under this section. At section 223 of his work on Attachment, Mr. Drake says, "It is a well-settled principle, that an attaching

creditor can acquire, through his attachment, no higher or better rights to the property or assets attached, than the defendant had *when the attachment took place*, unless he can show some fraud or collusion by which his rights are impaired." See also, sec. 245 of the same work, and *Kingsmill* v. *Warrener*, 13 U. C. R. 18; *Potter* v. *Carroll*, 9 C. P. 442. The Sheriff has no better rights than the absconding debtor and the attaching creditor had.

On recovery of judgment and subsequent death of the Sheriff, it would appear to be law that execution should properly issue in the name of his personal representative (after suggestion of death,) and not in the name of his successor in office: *Dickenson* v. *Harvey*, 6 P. R. 170. But if the Sheriff should die before judgment, the action should then be carried on under section 27, in the name of his successor. The "recovery in such suit" shall operate as a discharge as against the absconding debtor, and be a bar to any action that he might bring for the same cause. Should an absconding debtor return to the Province with promissory notes which had not been seized under attachment, he would have the right to sue on them: *Slattery* v. *Turney*, 7 U. C. R. 578. For form of affidavit and order, see appendix.

Averment to be inserted in Sheriff's declaration.

25. The declaration (*a*) in any such action by the Sheriff shall contain an introductory averment to the effect following:

A. B., Sheriff of (&c.) who sues under the provisions of *The Act respecting Absconding Debtors*, in order to recover from C. D., debtor to E. F., an absconding debtor, the debt due (*or other claim according to the facts*) by the said C. D., to the said E. F., complains, &c.

C. S. U. C. c. 25, s. 26.

(*a*) THE DECLARATION.

As will be seen by reference to the 1st and 4th Orders of the Judicature Act, under certain circumstances the proceedings in an attachment suit against an absconding debtor are to be taken in pursuance of that Act, and under other circumstances under the old practice. The writer is of the opinion that this suit by the Sheriff would be governed by the Judicature Act, as being an "action" under the 1st Rule, and that the statement of claim should show all that this section formerly required to be shown in a declaration. See the notes to the 24th section; *Wallace* v. *Cowan*, 9 P. R. 144; *Campan* v. *Lucas*, 9 P. R. 142; *Beaty* v. *Brice*, 9 P. R. 320.

26. The Sheriff shall not be bound to sue any party as aforesaid until the attaching creditor gives his bond with two sufficient sureties, payable to such Sheriff by his name of office in double the amount or value of the debt or property sued for, conditioned to indemnify (*b*) him from all costs, losses and expenses to be incurred in the prosecution of such action or to which he may become liable in consequence thereof. C. S. U. C. c. 25, s. 27.

Sheriff not bound to sue until creditor gives bond to indemnify him.

(*b*) SHERIFF TO BE INDEMNIFIED.

This is simply giving to the Sheriff, by express enactment, an indemnity which at law all parties, who, before allowing their names to be used by others as plaintiffs in a suit for the benefit of somebody else, are entitled to have: *Auster* v. *Holland*, 3 D. & L. 740; *Spicer* v. *Todd*, 1 Dowl. 306. If the Sheriff should unreasonably refuse to accept such bond, the Court or Judge could exercise summary jurisdiction over him, and he could be made responsible as well for any loss sustained thereby. The bond must not be to the Sheriff *by name*, but simply *to "The Sheriff of the County of* ," his name of office. The bond being a statutory one, the condition of it should carefully follow the words of the statute: *Kingan* v. *Hall*, 23 U. C. R. 503. A form of bond will be found in the Appendix.

Sheriff's successor may continue the action.

27. In the event of the death, resignation or removal from office of any Sheriff after such action brought, the action shall not abate (*c*), but may be continued in the name of his successor to whom the benefit of the bond so given shall enure as if he had been named therein, and a suggestion of the necessary facts as to the change of the Sheriff as plaintiff shall be entered of record. C. S. U. C. c. 25, s. 28.

(*c*) ACTION NOT TO ABATE.

At common law all actions abated by the death of a plaintiff before judgment. The 228th section of the Common Law Procedure Act, and Rule 383 of the Judicature Act, placed the law on a reasonable basis. The action may be continued to judgment, in the event of the death, resignation or removal from office of the Sheriff in whose name such action was brought, in the name of his successor. If execution is required *after* death of the Sheriff, it should be sued out in the name of his personal representative: *Dickenson* v. *Harvey*, 6 P. R. 170. No order appears to be necessary as was required by the C. L. P. Act, and as is required by the Judicature Act. The suggestion is simply entered of record, and the change is complete. The action should be brought in the name of the person who, for the time being is Sheriff.

WHEN DISTRIBUTION TO BE RATEABLE.

Proceedings if several persons take out writs against the same absconding debtor.

28. When several persons sue out writs of attachment against an absconding debtor, the proceeds of the property and effects attached and in the Sheriff's hands, shall be rateably distributed (*d*) among such of the plaintiffs in such writs as obtain judgments and sue out execution, in proportion to the sums actually due upon such judgments, and the Court or a Judge may delay the distribution, in order to give reasonable time for the obtaining of judgment against such absconding debtor. C. S. U. C. c. 25, s. 29.

(*d*) DISTRIBUTION OF PROCEEDS.

The distribution of the proceeds of property seized under attachment will now be governed by the provisions of 46 Vict. chap. 6, sec. 4, sub-sec. 8. This new provision changes the effect of this section, so as to prevent certain creditors obtaining any priority over other execution creditors, and to give all creditors having executions in the Sheriff's hands at the time of distribution an *equal* right to participate in the proceeds. For decisions on the law as it formerly stood, see R. & J.'s Digest 6-8 and the notes to repealed section 20.

WHEN JUDGMENT CREDITOR IN DIVISION COURT TO PARTICIPATE.

Creditors under Division Court judgments to share *pari passu.*

29. Every creditor who produces a certified memorandum from the Clerk of any Division Court, of his judgment as aforesaid, shall be considered a plaintiff in a writ of attachment who has obtained judgment and sued out execution, and shall be entitled to share accordingly. C. S. U. C. c. 25, s. 30.

(*e*) DIVISION COURT CREDITORS TO PARTICIPATE.

Execution creditors in the Division Court have an equal right to participate with other creditors. As will be seen by the notes to the 28th section, and the repealed 20th section, the distinction between certain classes of creditors in respect to participation in the proceeds of the property has been abolished. It is submitted that in order to share in the proceeds of the property attached, Division Court creditors must have their executions in the hands of the ~~Sheriff.~~ Bailiff. A form of Clerk's certificate will be found in the appendix. For a discussion of the relative position of plaintiffs in the Superior and Division Courts, respectively, in respect to goods seized under attachment as the law formerly stood: see *Francis* v. *Brown*, 11 U. C. R. 559; *Fisher* v. *Sulley*, 3 U. C. L. J. 89.

Who to be entitled to share if the property proves insufficient to pay all.

30. In case the property and effects of the absconding debtor are insufficient to satisfy the sums due to such plaintiffs, none shall be allowed to share, (*f*) unless their writs of attachment were issued and placed in the hands of the Sheriff for execution within six months from the date of the first writ of attachment, or in case of a warrant of attachment, unless the same was placed in the hands of the Constable or Bailiff before or within six months after the date of the first writ of attachment. C. S. U. C. c. 25, s. 31.

(*f*) WHO TO SHARE IN PROCEEDS.

As will be observed in the remarks made to the next two previous sections *all* creditors, whether they issued attachments or not, who have their writs of execution in the hands of the Sheriff or Division Court Bailiff *before distribution*, are entitled to share in the proceeds, under the altered state of the law. The six months' limit here prescribed appears to be impliedly repealed by the statute, 46 Vict., cap. 6.

SURPLUS TO BE RESTORED.

When all the seizing creditors are satisfied, the remaining property to be delivered up.

31. If after the period of one month next following the return of any execution against the property and effects of any absconding debtor, or after a period of one month from a distribution under the order of the Court or a Judge, whichever last happens, and after satisfying the several plaintiffs entitled, there is no other writ of attachment or execution against the same property and effects in the hands of the Sheriff, then, all the property and effects of the absconding debtor, or unappropriated moneys the proceeds of any part of such property and effects, remaining in the hands of the Sheriff, together with all books of account, evidences of title or of debt, vouchers and papers whatsoever belonging thereto, shall be delivered to the absconding debtor or to the person or persons in whose custody the same were found, or to the authorized agent of the absconding debtor, and thereupon the responsibility of the Sheriff in respect thereto shall determine. C. S. U. C. c. 25, s. 32.

(*g*) WHEN SURPLUS TO BE RESTORED.

Creditors have no right to more than satisfaction of their debt and costs. When that has been done, of right, the

surplus must belong to the debtor or those from whom the property may have been taken. This section simply provides for effecting this measure of justice, and enacts that any surplus of the property attached, or any balance of money in the hands of the Sheriff, the proceeds of any part of such property, shall be delivered to the absconding debtor or his agent, or to the person in whose custody such property was found; see Drake on Attachment 426. As a precaution the Sheriff had better take a receipt from the persons to whom he delivers the property or money. While such property or money was in the hands of the Sheriff it would be subject to the rights of other creditors of the absconding debtor: *Patterson* v. *Perry*, 10 Abbott's P. R. 82. The absconding debtor would have an action against the Sheriff should he refuse to deliver up money or property: *Ainslie* v. *Rapelje*, 3 U. C. R. 275; Drake on Attachment, 428; but it would be a good answer by the Sheriff that the surplus property or money had become subject to execution or other proceedings: *Powers* v. *Scott*, H. T. 3 Vict. The moneys would be the subject of garnishment: *In re Smart* v. *Miller*, 3 P. R. 385; *Murray* v. *Simpson*, 8 Irish C. L. R. App. 45; *Watson* v. *Todd*, 5 Mass. 271; *Wheeler* v. *Smith*, 11 Barbour, 345; *Lightner* v. *Steinagel*, 33 Illinois, 510; *Lovejoy* v. *Lee*, 35 Vermont, 430; *Adams* v. *Lane*, 38 Vermont, 640; *New Haven Saw-mill Co.* v. *Fowler*, 28 Conn. 103. Any surplus property would be subject to execution: *Rowe* v. *Jarvis*, 13 C. P. 495. The Sheriff could not become the purchaser of any goods sold by him under any writ in his hands: *Doe d. Thompson* v. *McKenzie*, M. T. 2 Vict.; *King* v. *England*, 4 B. & S. 782; *Woods* v. *Rankin*, 18 C. P. 44; *Williams* v. *Grey*, 23 C. P. 561; *Burnham* v. *Waddell*, 28 C. P. 263.

SCHEDULE.

(*Section* 4.)

FORM OF WRIT OF ATTACHMENT AND SUMMONS.

Ontario, County of } Victoria, &c.
To the Sheriff of, &c.

[Seal.]

We command you, that you attach, seize and safely keep all the real and personal property, credits and effects, together with all evidences of title or debts, books of account, vouchers and papers belonging thereto, of C. D., to secure and satisfy A. B. a certain debt (*or* demand) of $ (*the sum sworn to*), with his costs of suit, and to satisfy the debt and demand of such other creditors of the said C. D. as shall duly place their Writs of Attachment in your hands or otherwise lawfully notify you of their claim, and duly prosecute the same. And We also command the said C. D., that within (*the time named in the Judge's order or rule of Court*) days after the service of this Writ on him, inclusive of the day of such service, he do cause special bail to be entered for him in Our Court (*or* County Court) of , in an action to recover $ (*the sum sworn to*) at the suit of the said A. B.; And We require the said C. D. to take notice that his real and personal property, credits and effects in Ontario have been attached at the suit of the said A. B., and that, in default of his putting in special bail as aforesaid, the said A. B. may, by leave of the Court or a Judge, proceed therein to judgment and execution, and may sell the property so attached: And We command you, the said Sheriff, that as soon as you have executed this Writ, you return the same with the inventory and appraisement of what you have attached thereunder.

Witness, &c.

In the margin.

Issued from the office of the Clerk of the Process (*or* Deputy Clerk of the Crown and Pleas *or* Clerk of the County Court in the County of .)

(Signed)
A. C., Clerk of the Process (*or* Deputy Clerk, *or* Clerk of the County Court.)

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six months from the date thereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

Endorsement to be made on the Writ before service thereof.

This Writ may be served out of Ontario, and was issued by E. F., of , Attorney, *&c.* (*as on a Writ of Summons, under "The Common Law Procedure Act"*).

C. S. U. C. c. 25, s. 5.

FORMS

OF

PROCEEDINGS UNDER THE ACT.

[The following forms are given by way of example and are not intended to meet the varying circumstances of the many cases that arise under the Statute. In all cases the facts must in a great measure determine the forms of proceeding. The forms here appended are of a general nature; but they can readily be changed so as to meet the facts of any particular case.]

1.—AFFIDAVIT FOR ATTACHMENT.

IN THE (*title of Court, etc.*)

I, , of, etc., make oath and say:

1. That (*name of debtor*) is a resident of the of in the County of , in the Province of Ontario, and that up to and until his departure from said Province, as hereinafter mentioned, carried on business there as a (*describe the business*).

2. That at the time of his departing, as hereinafter mentioned, the said (*name of debtor*) was and now is justly and truly indebted to me in the sum of dollars of lawful money of Canada, for (*here set out the cause of action with particularity, see page* 20,) and that such debt is now overdue.

3. That I, this deponent, have good reason to believe, and do verily believe that the said (*name of debtor*) has departed from the Province of Ontario and gone to ("*the United States of America*," or, "*the Province of Manitoba*," or, *as the case may be*,) with intent to defraud me of my just dues (or, "*to avoid being arrested or served with process*"), and that, on inquiry, I am unable to obtain any information as to what place in the said ("*United States of America*," or, "*the said Province of Manitoba*," or *as the case may be*) that the said (*name of debtor*) has fled to.

4. That the said (*name of debtor*) so departed from the Province of Ontario on or about the day of last past (or, *instant*), and was at the time of his so departing possessed of real and personal property, credits and effects not exempt by law from seizure, to his own use and benefit in the said Province of Ontario, and that the same (or, "*a portion thereof*") are now situate in the County of in this Province.

Sworn, etc.

[If the debtor has not real *and* personal property, but has only one or the other, the last paragraph of the affidavit can be altered so as to meet the facts. If made by a "servant" or "agent," the above form can easily be changed, but there should be a distinct paragraph in these words: "That I am the servant (or "*agent*") of (*name of creditor, place of residence and occupation*), and duly authorised by him to make this affidavit." As remarked at page 19, the affidavits for attachment should not be entitled *in any cause*.]

2.—AFFIDAVIT FOR ATTACHMENT.

(ANOTHER FORM.)

IN THE (*title of Court, etc.*)

I, , of etc., make oath and say:

(*The first, second and fourth paragraphs will be the same as the previous form. The third paragraph to be as follows:*)

3. That I, this deponent, have good reason to believe and do verily believe that the said (*name of debtor*) has departed from the Province of Ontario, but on inquiry I am unable to obtain any information as to what place he has fled to; with intent to defraud me of my just dues (or, "*to avoid being arrested or served with process.*")

3.—AFFIDAVIT OF TWO OTHER CREDIBLE PERSONS.

IN THE (*title of Court, etc.*)

I, , of, etc., make oath and say:

1. That I am well acquainted with (*name of debtor*) mentioned and described in the annexed affidavit of ("*the plaintiff, his servant or agent.*")

2. That the said (*name of debtor*) is a resident of the of in the County of , and Province of Ontario; and until his departure from said Province as hereinafter mentioned, carried on business there as a (*describe the business*).

3. That I have good reason to believe, and do believe that such debtor (*naming him*) has departed from the Province of Ontario, with intent to defraud the said (*name of creditor*, or "*to avoid being arrested or served with process.*")

[*There must be another affidavit like this.*]

4.—JUDGE'S ORDER FOR ATTACHMENT.

IN THE (*title of Court, etc.*)

Upon reading the affidavits of (*the creditor, his servant or agent, and the two corroborative affidavits*), this day filed, and upon the application of the said creditor:

It is ordered that a writ of attachment do issue from (*name of Court*), at the suit of (*name of creditor*) against (*name of debtor*) of, etc., as an absconding debtor, according to the statute in that behalf, and directed to the Sheriff of the County of .

It is further ordered that the said (*name of debtor*) shall have days from the day of service of the said writ for putting in special bail thereto.

[*Here insert any other provision which the circumstances of the case require. The præcipe for writ will be indorsed on affidavits or order.*

5.—AFFIDAVIT FOR LEAVE TO PROCEED UNDER SECTION 8.

IN THE (*title of Court and cause.*)

I , of etc., make oath and say:

1. That I am the sheriff's officer to whom was intrusted the execution and service of the writ of attachment in this cause.

2. That in pursuance of the said writ and then being in the lawful authority of the sheriff of the County of , and while it was in force, I, as his officer, duly attached (*here describe the property attached in general terms*), which property and effects have been taken into the charge and keeping of such sheriff.

3. That the said writ of attachment was personally served by me on the said defendant on the day of 18 , (or, "*if not personally served*") the affidavit must shew that reasonable efforts were made to effect such service and that such writ came to the defendant's knowledge, or that the defendant has absconded in such a manner that after diligent inquiry no information can be obtained as to the place he has fled to, and to establish a case for an order, it will be necessary to shew as far as possible the following:

(1) Where the defendant resided, and what was his business or profession when in the Province.

(2) What property (if any) he has in the Province, and in whose hands it is.

(3) Whether he has any (and if any, what,) friends or relations, residing in the Province or elsewhere.

(4) That the defendant has not put in special bail to the action.

(5) *What* specific efforts have been made to effect personal service on the defendant, and to discover his whereabouts. 3 U. C. L. J. 69. Any other facts and circumstances tending to strengthen the application should be shewn. Even if the writ came to the defendant's knowledge, the Judge in his discretion might require some further attempt to effect service, or might appoint some other act to be done which should be deemed good service. The facts need not be deposed to by the sheriff's officer alone; but as many affidavits as are necessary may be used. The object to be attained is to bring the writ to the defendant's knowledge if possible, *per* Lord Jessel in *Wolverhampton & Staffordshire Railway Co.* v. *Bond*, 43 L. T. N. S. 721. See also *Furber* v. *King*, 29 W. R. 535.

6.—ORDER FOR LEAVE TO PROCEED UNDER SECTION 8.

IN THE (*name of Court*), style of cause, etc.

Upon the application of the said plaintiff, and upon reading the affidavits of (*names of deponents*), this day filed, and upon hearing the said plaintiff by his solicitor:

It is ordered that the service of a copy of the writ of attach sued in this cause on the wife of the said defendant, and the mailing of a copy thereof, postage prepaid [and registered] to the defendant, addressed to him at post office (*his last P.O. address in this Province, or elsewhere if known*), and by posting up a copy of said writ on the door of the store (*dwelling-house, shop, or other building, as may be deemed best*) lastly occupied by the said defendant, in the of (or *the Judge may appoint some other or different act to be done*), and upon such being done, the same shall be deemed good service of the said writ of attachment.

And it is further ordered that if the defendant does not put in special bail to the said writ within the time therein limited therefor, the plaintiff shall be at liberty to proceed in the action by filing in the office of the Deputy-Clerk of the Crown, at (or, "*of the Clerk of the County Court of* ," *as the case may be*,) a declaration and notice to plead in eight days otherwise judgment, and by posting up in said office a copy of each of said declaration and notice to plead, and by mailing a copy of each addressed to the defendant, at (*here insert the defendant's last known post-office address in this Province, or, if his address elsewhere is known, then to him there*), postage thereon prepaid [and registered]; and if the defendant does not put in special bail within the time limited therefor, and plead or demur thereto within said eight days, the plaintiff shall be at liberty, on proof of such facts, to sign interlocutory judgment, and on the amount of the plaintiff's debt being ascertained by (*naming the proper officer,*) under the 197th section of "the Common Law Procedure Act," to whom such is hereby referred, that the plaintiff may sign final judgment therefor, together with his costs of suit to be taxed.

(*Judge's signature.*)

[The above is simply given as a general form. The form of order must in each case conform to the circumstances and be in accordance with the opinion of the Judge as to what is necessary to be done.]

7.—CERTIFICATE OF ASSESSMENT OF DAMAGES PURSUANT TO SECTION 9.

[TO BE INDORSED ON ORDER OF REFERENCE.]

(*Court and Cause, etc.*)

In pursuance of the within order, I hereby certify that I have ascertained the amount of the damages which the plaintiff is entitled to herein and find the same to be $.

Given under my hand this day of A.D. 188 .

(*Signature.*)

8.—AFFIDAVIT UNDER SECTION 9 OF SUM JUSTLY DUE.

(*Court and Cause, etc.*)

I, , of, etc., make oath and say:

1. That I am the above-named plaintiff (or, *the attorney or agent of the above-named plaintiff, as the case may be,*) in this cause.

2. That final judgment was signed herein on the day of for the sum of $ debt and costs.

3. That the sum of $ is now justly due to me (or, *the above-named plaintiff*) by the said defendant, after giving him credit for all payments and claims which might be set-off or lawfully claimed by the said debtor at the time of making this affidavit.

Sworn, etc.

9.—AFFIDAVIT FOR LEAVE TO DEFEND UNDER SECTION 10.

(*Court and Cause, etc.*

I, , of, etc., make oath and say:

1. That I am the above-named defendant in this cause.

2. (*Here set out fully facts and circumstances shewing why the defendant did not put in special bail within the time limited in the Writ of Attachment,*

and disclosing a good defence on the merits, all if possible supported by corroborative affidavits. See Notes to section 10. Chitty's Forms, 11th Ed. 97.)

3. For the reasons and under the circumstances aforesaid, I am advised and verily believe that I have a good defence to this action on the merits.

4. That execution has not been executed in this cause.

Sworn, etc.

10.—ORDER ALLOWING DEFENDANT IN, TO DEFEND UNDER SECTION 10.

(Court and Cause, etc.)

Upon the application of the defendant, and upon reading the affidavits and papers filed.

It is ordered that the defendant be allowed to put in special bail herein within days from this date, and to defend this action pursuant to the 10th section of "An Act respecting Absconding Debtors."

(If judgment has been signed, provision should be made for setting it aside. As the application is to the discretion of the Court or Judge, terms could be imposed on granting it.)

(Signature.)

11.—RECOGNIZANCE OF BAIL OR BAIL-PIECE.

(Name of Court.)

(Name of County in which bail is taken.) C. D. of, etc., in the County aforesaid, is delivered on bail upon a writ of attachment, under Chapter 68 of the Revised Statutes of Ontario, to E. F. of, etc. *(occupation)*, and G. H. of, etc. *(occupation)*, *(the bail)*, at the suit of A. B., *(the plaintiff.)*

Taken and acknowledged at in the County of , the day of A.D. 188 , before me.

A Commissioner, for taking recognizances of bail in and for the said County of .

(Lush's Pract. 3rd Ed. 720. The bail-piece need not be signed.)

12.—ACKNOWLEDGMENT OF BAIL.

You (*calling the bail by their names*) do jointly and severally undertake that if the defendant, (*naming him*) shall be condemned in this action at the suit of the plaintiff (*naming him*) he will satisfy the costs and condemnation money, or render himself to the custody of the Sheriff of the County of (*that in which the attachment issued*) or that you will do so for him.

(*Lush's Pract. 3rd Ed. 721, C. L. P. Act, s. 40.*)

13.—AFFIDAVIT OF JUSTIFICATION OF BAIL.

IN THE (*name of Court.*)

BETWEEN A. B., Plaintiff,

and

C. D., Defendant.

E. F., of the, etc., , one of the bail for the above-named defendant maketh oath and saith that he is a housekeeper (or, *freeholder, as the case may be*) residing at (*give particular description of the place of residence,*) that he is worth property to the amount of $ (*double the amount sworn to*) over and above what will pay all his just debts (*if bail in any other action,* add, and every other sum for which he is now bail,) that he is not bail for any defendant except in this action (*or if bail in any other action or actions*), add, except for at the suit of in the Court of in the sum of $, for at the suit of in the Court of in the sum of $, (*specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail.*)

Sworn, etc., (as usual.)

(*Each of the bail will justify as above. The affidavit may be a joint one.*)

14.—AFFIDAVIT OF DUE TAKING OF BAIL.

(*Court and Cause.*)

I of, etc , , make oath and say: That the recognizance of bail or bail-piece hereunto annexed, was duly taken and acknowledged by E. F. of, etc., and G. H. of, etc., the bail therein named before J. K., Esquire, the Commissioner who took the same in this deponent's presence, the day of , A.D. 188 , at in the County of .

Sworn, etc.

15.—NOTICE OF BAIL.

(*Court and Cause.*)

Take notice that the bail-piece in this cause, together with affidavit of due taking thereof, was this day filed with (*naming the proper officer*), at , and that the names, additions, and other particulars of and relating to such bail are as follows:—The said bail are , of, etc. (*addition*), who is a housekeeper (or *freeholder*) there; and , of, etc. (*addition*), who is a housekeeper (or *freeholder*) there; and that the said (*naming the bail*) have, in pursuance of the rule of court in that behalf, made and sworn the affidavits, a true copy of which is hereto annexed, and which affidavits are filed with the said bail-piece.

Dated, etc.

Yours, etc.

To

Esquire,
Plaintiff's Solicitor.

Defendant's Solicitor.

16.—INVENTORY OF PROPERTY SEIZED BY THE SHERIFF UNDER SECTION 13.

(Court and Cause.)

An inventory justly and truly made of all the property, credits and effects, evidences of title or debt, books of account, vouchers and papers, including all rights and shares in any association or corporation, made by the undersigned S. M., Sheriff of the County of
and the undersigned N. O. and P. R., two substantial freeholders of the said County, called by the said Sheriff to his assistance, in pursuance of the 13th section of "An Act respecting Absconding Debtors," the same having been attached by me, the said Sheriff, under and by virtue of a writ of attachment issued herein, that is to say. *(Here give an accurate and particular description of all property of every nature attached by the Sheriff.*

Given under our hands this day of A.D. 188

S. M. } Sheriff of the County of .

N. O. } Freeholders of the said

P. R. } County.

(To be returned with the writ of attachment. See page 82.)

17.—SHERIFF'S RETURN TO WRIT OF ATTACHMENT.

(To be indorsed on Writ.)

Under and by virtue of the within writ of attachment to me directed and delivered, and in pursuance of the statute in that behalf, I have duly attached, and have in my charge and keeping, all the property, credits and effects, evidences of title or debt, books of account, vouchers and papers, including all rights and shares in any association or corporation of the within named defendant within my bailiwick, all of which are particularly mentioned and described in the inventory hereto annexed marked "A," as by the said writ I am directed and commanded.

Dated, etc.

S. M.,
Sheriff of the County of .

(See Watson on Sheriff, 88.)

18.—APPRAISER'S OATH UNDER SECTION 14.

(*Court and Cause.*)

I, of, etc., make oath and say:

1. That I have been appointed by the Sheriff of the County of appraiser of certain property attached by him in this cause.

2. That I will, to the best of my skill and ability, duly appraise and value the said property according to the statute in that behalf.

Sworn, etc.

(*The other appraiser will make a similar affidavit, or the two appraisers may make a joint affidavit. See p.* 87.)

19.—APPRAISEMENT OF PERISHABLE PROPERTY UNDER SECTION 14.

We, , and , the appraisers duly appointed by the Sheriff of the County of to appraise and value the property mentioned and described in the annexed inventory, and each of us having first taken his oath to do the same to the best of his skill and ability, do hereby, in pursuance thereof, appraise and value the same at the sum set opposite to each item appearing on the said inventory, and amounting in the whole to the sum of $.

Given under our hands this day of A.D. 188 .

Witness. } (*Signatures of Appraisers.*)

(*Inventory to be attached. See p.* 87.)

20.—NOTICE OF SEIZURE OF PERISHABLE PROPERTY UNDER SECTION 15.

(*Court and Cause.*)

Take notice that I have seized under the Writ of Attachment issued in this cause the following goods and chattels, namely: (*Here describe the*

perishable property seized with reasonable particularity) and that you are hereby notified thereof, in pursuance of the 15th section of "An Act respecting Absconding Debtors."

Dated, etc.

Yours, etc.,
S. M.,
Sheriff of the
County of .

To A. B., the above-named plaintiff, *or* to his Solicitor.

21.—BOND UNDER SECTION 14, ON SALE OF PERISHABLE PROPERTY.

(*Court and Cause.*)

Know all men by these presents, that we, of, etc., and of, etc. (*must be freeholders*), are, and each of us is, jointly and severally held and firmly bound to the above-named defendant in the sum of $ (*double appraised value of articles*), to be paid to the defendant, his certain attorney, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves; and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated this day of A.D. 18 .

Whereas the above-named plaintiff hath sued out of the said Court a writ of attachment against the above-named defendant under the provisions of the Act respecting Absconding Debtors, on which certain perishable goods or chattels, and such as from their nature cannot be safely kept or conveniently taken care of, have been seized by the Sheriff of the County of , and the said Sheriff has had the said articles appraised and valued at the sum of dollars; and whereas the said plaintiff hath requested the said Sheriff to expose and sell the said goods, chattels and property according to law, and gives this bond as an indemnity therefor. Now the condition of this obligation is such that if the said plaintiff, his heirs, executors or administrators shall pay to the defendant, his executors or administrators the said appraised value of the said articles, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then this obligation to be void or else to remain in full force and virtue.

Signed, sealed and delivered in presence of

Seal.

Seal.

[*The bond had better be accompanied by affidavits of justification and execution. The former can easily be adapted from the affidavit of justification in putting in special bail, ante No.* 13. *The Sheriff should indorse these words on the bond, "I hereby approve of the sufficiency of the within named bondsmen this day of* 18 *," and sign the same. The plaintiff does not join in this bond, as he is required to do in No.* 28.]

22.—AFFIDAVIT FOR ORDER FOR SALE OF GOODS UNDER 46 VICTORIA, CHAPTER 6, SECTION 4.

(*Court and Cause.*)

I, of, etc., make oath and say:

1. That I am the above-named plaintiff in this cause, and a creditor to the amount of $, of the above-named defendant, who is an absconding debtor, under "An Act respecting Absconding Debtors."

2. That, at the present time, I have a writ of attachment (*or a writ of execution*) in the hands of the Sheriff of the County of , and that such writ was delivered to the said Sheriff on the day of , last past, and has uninterruptedly remained in his hands for execution ever since.

3. That the said defendant has in fact absconded from the Province of Ontario and gone to (*stating where*) and my reasons for so believing are as follows: (*Here set out fully such facts and circumstances as warrant the opinion that the defendant has "in fact absconded."*)

4. That the said Sheriff has seized under the said writ of attachment (or, *execution*) the goods and chattels mentioned and described in the annexed list, marked "A," and that the same are at present in his custody and possession thereunder.

5. That the said goods and chattels comprise all the property of the defendant that the said Sheriff has been able to attach, or seize, and that the defendant has not any other property of any kind liable to said attachment (or, *execution*.)

6. That the value of the said property is about the sum of $, and that the claims of persons who have sued out writs of attachment or execution against the said defendant, and now in force, amount at least to the sum of $, and that such property is not sufficient to pay in full the claims of the said persons.

7. That I verily believe that the interests of attaching and execution creditors of the said defendant, and of all others, will be best subserved by an immediate sale of the said property. (*If any other reasons for sale here set them out.*)

Sworn, etc.

(*The affidavit may be made by any person who can depose to the necessary facts.*)

23.—ORDER FOR SALE ON NEXT PRECEDING AFFIDAVIT.

(*Court and Cause, etc.*)

Upon the application of the plaintiff herein, and upon reading the affidavits and papers filed:

It is ordered that the Sheriff of the County of
shall sell the goods and chattels (except chattels real) attached by him under the writ of attachment issued and placed in his hands in this cause, pursuant to the provisions of the Act 46 Victoria, chapter 6, section 4, and that the costs of this application and order shall be first paid out of the proceeds of said sale. (*If any special terms imposed they can be inserted here.*)

24.—CERTIFICATE OF DIVISION COURT CLERK UNDER SECTION 16.

In the Division Court of the County of .

Between A. B., Plaintiff,

and

C. D., Defendant.

I, E. F., Clerk of the above-mentioned Court, do hereby certify that a warrant of attachment was issued in this cause on the
day of last past, and that certain goods, chattels, property and effects of the said defendant were duly attached thereunder, and were (or *the proceeds thereof*) delivered up to the Sheriff of the County of , in pursuance of section 16 of "An Act respecting Absconding Debtors," that judgment was obtained by the said plaintiff herein against the defendant on said attachment proceedings, on

the day of A.D. 188 , for the sum of $ debt, and $ costs, and that such sums still remain entirely unpaid, and said judgment unsatisfied.

Given under my hand and the seal of the said Court, this day of A.D. 188 .

Seal.

E. F.,
Clerk.

25.—NOTICE TO DEBTORS OF THE DEFENDANT UNDER SECTION 22.

(*Court and Cause.*)

Take notice that a writ of attachment has been issued in the above cause, and you are hereby required not to pay to the said defendant, or any person for him, or on his behalf, any money owing by you to him on any debt or demand that he may have against you, nor are you to deliver up to him any property or effects of his in your custody or possession.

Dated, etc.

To
(*Name of debtor, or debtors.*)

Yours, etc.,
E. F.,
Plaintiff's Solicitor.

26.—AFFIDAVIT FOR ORDER FOR SHERIFF TO SUE UNDER SECTION 24.

(*Court and Cause.*)

I, of, etc., make oath and say:

1. That I am the above-named plaintiff in this cause.

2. That as a creditor of the above-named defendant, I caused an attachment to be issued against him under "An Act respecting Absconding Debtors" on the day of A.D. 188 , and caused the said writ to be delivered to the Sheriff of the County of for execution, to whom the same was directed.

3. That in pursuance of said writ, certain property, goods, chattels, credits and effects were seized by the said Sheriff.

4. That on the day of last past I obtained judgment and execution in this cause for the sum of $ debt and costs.

5. That the total amount of the executions against the defendant in the hands of the said Sheriff at the present time is $.

6. That all of the real and personal property, goods, chattels, credits and effects of the defendant that were saleable have been sold and realized upon by the said Sheriff producing the sum of $, and over and above the said proceeds thereof, there remains a deficiency on said executions against the defendant of the sum of $.

7. That the persons mentioned in the annexed paper marked "A" are, as I am informed and verily believe, indebted to the said defendant in the respective amounts and for the causes of action set opposite each name respectively, and that I believe the places of residence of said persons are therein also correctly set forth.

8. That I verily believe the interests of said execution creditors will be best subserved, if suits are allowed to be brought by the said Sheriff for said claims.

Sworn, etc.

(*Any special clauses to meet the circumstances can be added.*)

27.—ORDER FOR SHERIFF TO SUE UNDER SECTION 24.

(*Court Cause, etc.*)

Upon the application of the plaintiff, and upon reading the affidavits and papers filed herein; It is ordered that the Sheriff of the County of may, in pursuance of the 24th section of "An Act respecting Absconding Debtors," sue for and recover from the persons mentioned in the annexed list marked "A" the sums, and for the causes of action mentioned and set opposite the names of such persons respectively on said list as indebted to the said defendant, together with costs of suit.

(*If any other special provision it can be inserted. It would seem that if real estate is attached, it should also be sold before order could be granted.*)

28.—BOND OF INDEMNITY TO SHERIFF UNDER SECTION 26.

(Court and Cause.)

Know all men by these presents that we A. B. of, etc., and C. D. of, etc., and E. F. of, etc., are jointly and severally held and firmly bound unto the Sheriff of the County of , in the penal sum of $, of lawful money of Canada (*double the amount or value of the debt or property sued for*) to be paid to the said Sheriff or to his certain attorney, executors, administrators or assigns, for which payment well and faithfully to be made we bind ourselves and each and every of us in the whole, our and each and every of our heirs, executors and administrators, jointly and severally firmly by these presents, sealed with our seals, and dated this day A.D. 188 .

Whereas the above bounden A. B. (the plaintiff above-named) obtained an order in the above cause for the said Sheriff to sue for and recover from (*Here name the person to be sued*) a certain debt due by him to the said defendant in pursuance of the 24th section of "An Act respecting Absconding Debtors."

And Whereas the Sheriff before bringing the said action requires the said plaintiff to indemnify him pursuant to the 26th section of the said Act, and these presents are hereby entered into for that purpose, therefore:

The condition of the above obligation is such that if the above bounden A. B. shall well and truly indemnify and save harmless the said Sheriff from all costs, losses and expenses that may be incurred in the prosecution of an action for the said debt, or to which he may become liable in consequence thereof, then this obligation to be void, otherwise to be and remain in full force, virtue and effect.

Signed, Sealed and delivered in presence of

J. K.

A. B. : Seal. :

C. D. : Seal. :

E. F. : Seal. :

[*An ordinary affidavit of execution should be attached, and if the Sheriff should require it affidavits of justification also. The latter can easily be framed from Form No. 13, ante.*]

29.—CERTIFICATE OF DIVISION COURT CLERK UNDER SECTION 29.

In the Division Court for the County of .

Between A. B., Plaintiff,

and

C. D., Defendant.

I, E. F., Clerk of the said Court, do hereby certify that the above-named plaintiff recovered a judgment against the defendant in this Court and cause on the . day of A.D. 188 , for the sum of $ debt, and $ costs, and that there is now due on said judgment the sum of $, inclusive of interest, and for which total sum there is now an unsatisfied execution against the defendant in the hands of the Bailift of this Court.

Given under my hand and the seal of the said Court, this day of 188 .

E. F.,
Clerk.

Seal.

30.—ACQUITTANCE TO SHERIFF ON HIS RESTORING ANY SURPLUS UNDER SECTION 31.

(*Court and Cause.*)

I hereby acknowledge to have received from the Sheriff of the County of all property and effects of me, the above-named defendant, and all unappropriated moneys, the proceeds of any part of such property and effects, together with all books of account, evidences of title or of debt, vouchers and papers whatsoever belonging thereto, pursuant to the 31st section of "An Act respecting Absconding Debtors."

Dated, etc.

(Signature.)

The following are the sections of the Act, 46 Victoria, chapter 6, having reference to Attachment proceedings:

Sale of goods under writ of attachment.

R. S. O. c. 68, ss. 20, 21, repealed.

4. "The court out of which a writ of attachment issues, or a judge having authority to make orders therein, may, at any time after a writ of attachment has been in the hands of a sheriff, or other officer, for one month, direct such sheriff, or other officer, to sell any goods or chattels, except chattels real, which have been attached under such writ.

(2) "An order for sale may be made upon the application of any creditor having a writ of attachment, or a writ of execution, in the hands of the sheriff, and shall be made wherever the judge is satisfied that the alleged debtor has in fact absconded indebted to the applicant, and that the property attached is not sufficient to pay in full the claims of the persons who have sued out writs of attachment, or execution, but this provision shall not be construed to restrict the authority of the court or judge to make an order in other cases; and in all cases the court or judge may impose such terms as are deemed fitting.

(3) "No writs of execution received by a sheriff or other officer after the receipt of a writ of attachment, shall take priority of the writ of attachment, but all writs of execution placed in the hands of the sheriff, or other officer, prior to the distribution of the proceeds of the effects

attached, shall, subject to any priority given for costs incurred under the first writ of attachment, rank ratably in proportion to the sums actually due thereon, whether or not any of the writs of execution are or is founded upon a writ of attachment.

(4) "The twentieth and twenty-first sections of the *Revised Statute respecting Absconding Debtors* are hereby repealed."

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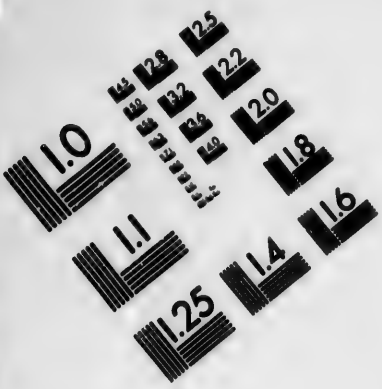

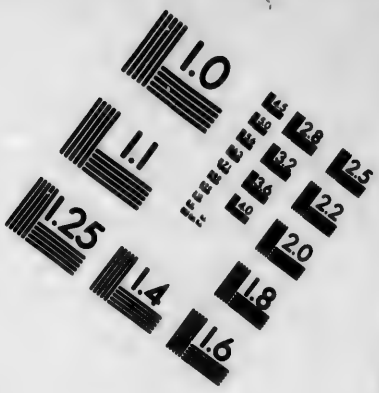

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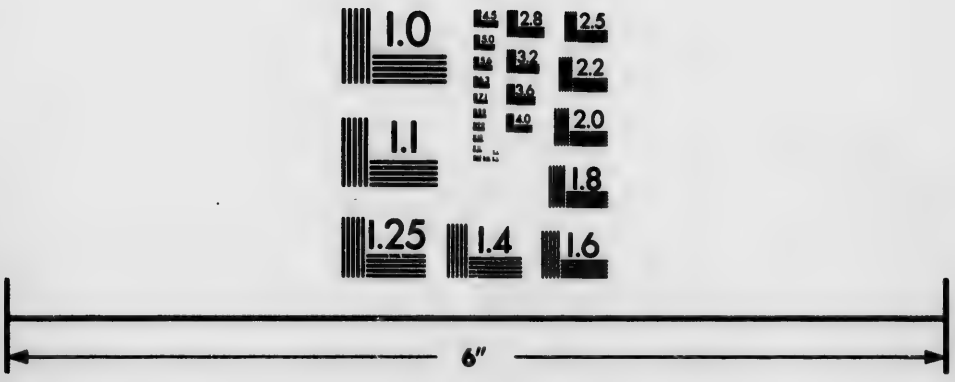

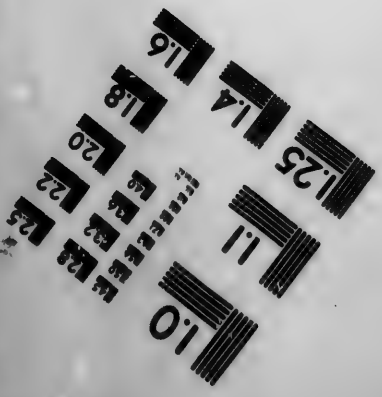

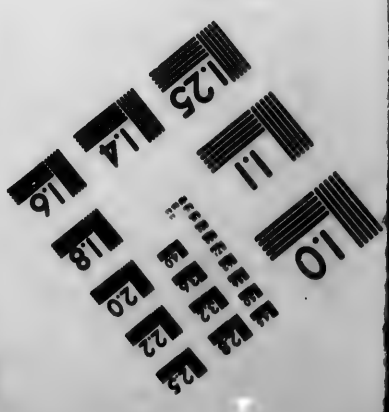

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